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SECOND CHAMBERS

AN INDUCTIVE STUDY IN POLITICAL SCIENCE

BY

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PREFACE TO SECOND EDITION

THIS book was first published in the early part of 1910—before the introduction of the Parliament Bill —and was received with a generosity and kindness for which I was and am grateful, in particular for the tribute paid by nearly all my critics to the impartiality by which the book was thought to be characterized. I hope that feature has remained unimpaired.

At the request of the Delegates of the University Press I have now revised the book for a new edition. I undertook the task with a light heart, imagining that a few notes, with perhaps one additional chapter, would suffice to bring the book up to date. I have been undeceived, and in the event found myself compelled in order that it might now be uniformly up to date (July 1927) not only to undertake complete revision but in parts to rewrite whole paragraphs and even chapters.

During the seventeen years which have elapsed since the first publication of this book much has happened of high consequence to the problem with which it treats, but nothing to minimize the significance of that problem nor to invalidate the conclusions at which I had arrived. In England, the passing of the Parliament Act; the wide extension of the parliamentary franchise by the Act of 1918; the Second Chamber Conference presided over by Lord Bryce in 1917–18; the advent of a Socialist Ministry to office if not to power; abroad, the fall of Great Empires and the deposition of hereditary rulers; the multiplication of Republics; the emergence or creation of many nation-states; the abandonment of old constitutions, the adoption of new ones—mostly bicameral; everywhere, the advancing tide of Democracy, the increasing aggressiveness of

Socialism, a sustained attack upon the principle of private property and individual enterprise—these things and many others of like import have certainly not weakened the case for an effective Second Chamber.

They have, however, left the British House of Lords even more isolated than ever among the political institutions of the world.

This book was and remains primarily expository: it aimed at describing what has been and is. But so far as it reached towards an argumentative conclusion, the conclusion was that philosophy and experience concurred in establishing the need for a Second Chamber, although neither could be invoked as an apology for the existing House of Lords. If that conclusion be accepted, it follows that reforms, perhaps drastic reforms, are called for to render the House of Lords efficient for the part which a Second Chamber should play in the democratic State. The Report of the Bryce Conference illustrates, though less eloquently than the prolonged discussions which preceded its adoption, the difficulty of the problem, even if it does not conspicuously contribute to its solution. But neither participation in those discussions nor anything else which has happened since the first publication of this book has weakened my conviction that, unless we are to incur the dangers declared by philosophy and proved by experience to be inseparable from Single-Chamber Government, a solution must be found. If the following pages in any degree help towards it, my purpose will be achieved.

J. A. R. M.

YORK
October 14, 1927.

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I. INTRODUCTORY

'A majority in a single assembly, when it has assumed a permanent character—when composed of the same persons habitually acting together, and always assured of victory in their own House—easily becomes despotic and overweening, if released from the necessity of considering whether its acts will be concurred in by another constituted authority. The same reason which induced the Romans to have two consuls makes it desirable there should be two chambers: that neither of them may be exposed to the corrupting influence of undivided power, even for the space of a single year.'—JOHN STUART MILL.

SECURUS iudicat orbis terrarum. With rare unanimity the civilized world has decided in favour of a bicameral legislature. 'If a Second Chamber dissents from the first, it is mischievous; if it agrees with it, it is superfluous.' Such was the superficial dilemma propounded by the Abbé Siéyès, arch-constitution-monger of the French Revolution. 'It passes the wit of man to construct an effective Second Chamber.' Such is, in effect, the characteristic conclusion of the doctrinaire pessimism of which Mr. Goldwin Smith was so distinguished an exponent. But the progressive nations of the modern world have almost without an exception declined to impale themselves upon either horn of the dilemma of Siéyès; they have not been deterred by abstract considerations against the theory of two co-ordinate legislative chambers; and have clung, despite wide differences of circumstance and contrasted forms of constitution, to the two-chambered structure long since evolved by the mother of Parliaments. France—royalist, imperialist, and republican—has throughout all her recent constitutional changes resolutely refused to renew the experiment associated with the first and second Republics. The other unitary States of Europe have, with the single exception of Greece,[1] followed the English model.

[1] Norway is sometimes reckoned among unicameral legislatures; Greece is now (1927) considering a reversion to bicameralism. Among the post-war States Jugo-Slavia, Esthonia, Latvia, and Lithuania are unicameral. But it is significant that Poland, Czecho-Slovakia, the Austrian Republic, and the Irish Free State all adhere to the bicameral principle.

Federal States, the German Reich and the Helvetic Republic, look to their Second Chambers for the embodiment and satisfaction of the federal idea. The great English-speaking communities beyond the sea, whether republican or monarchical, presidential or parliamentary, federal or unitary, concur in their adhesion to the bicameral arrangement.

For such unanimity in regard to one constitutional device, amid endless diversity in others, there must be solid reasons in history, experience, and fact. Many *a priori* considerations may be adduced which would seem to point in the opposite direction. Theory finds it difficult to escape the dilemma propounded by Siéyès. It may be urged that in the case of the mother of Parliaments the evolution of a bicameral form was accidental. In one sense it was. We might, as will be shown hereafter, have had three Houses, corresponding to the three Estates, as they had in Scotland and France; we might even, like Sweden, have had four; we might have had one. The ultimate form assumed by the parliamentary structure was unquestionably in some sort accidental. But it is not as though the modern world had had no choice—no experience of other forms. The unicameral experiment was not untried even in England. The constitutional history of France affords examples of the tricameral as well as the unicameral form. The fathers of the American Constitution lacked neither erudition nor sagacity. They were well versed in political philosophy, and were not ignorant of constitutional practice. Why did they, after brief experience of the unicameral, adopt the bicameral form of legislature? Canada, perhaps, was hardly a free agent; English prepossessions might account for adherence to the English model, alike in 1791, in 1840, and in 1867. But no one can suppose that any pressure in favour of traditional forms would have been brought to bear upon the democratic communities in Australasia and South Africa, had they preferred to strike out a new path for themselves. But with unbroken unanimity they have adhered to the old. Again we must ask: Why?

The following pages are not intended to supply a direct answer to the questions so bluntly propounded. They will be found to be primarily expository; in a less degree historical; least of all argumentative and controversial. My main purpose is to describe, concisely but accurately, the construction of the legislative machine in some typical states of the modern world; to analyse the composition and to explain the constitutional functions of their 'Second' Chambers, and by this inductive process to reach, if possible, some conclusions which may not only interest the student of political institutions, but may even afford some slight assistance to the ordinary citizen who is confronted with the responsibility of deciding grave constitutional issues. In arriving at a decision the deliberate judgement of the world cannot safely be ignored. Nor can we regard it as superfluous to appreciate the reasons which have led to its formation. But the first essential is a knowledge of the facts. These facts the following pages will disclose.

With the abstract considerations for and against a Second Chamber I am not greatly concerned. They have long since become the commonplace of the debating society. But their appeal leaves both the student and the statesman unmoved. The necessity of a counterpoise to democratic fervour; the safety which lies in 'sober second thoughts'; the advisability of a check on hasty and ill-considered legislation; the value of an appeal from Philip drunk to Philip sober; the liability of a single chamber to gusts of passion and autocratic self-regard—all these familiar arguments, and many like them, may be as sound as on the day when they were first employed; but somehow the salt has lost its savour. And not less have the abstract arguments on the other side. The only satisfactory appeal, I venture to submit, is the appeal to history; the only safe guide, that of experience. Closer investigation may suggest the conclusion that the world has set up a constitutional fetish; that the young democratic communities have sheep-like followed a misguided leader; or that institutions have been unintelligently imitated

without sufficient regard to conditioning circumstances. On the other hand, investigation may disclose the fact that under conditions singularly diverse a particular constitutional form has shown unexpected vitality and capacity for adaptation; that the bicameral structure is, under alien skies, a natural and not an artificial growth; that it corresponds to proved necessities, and is, therefore, destined to permanence. But the conclusion is not yet. We may indeed be constrained to confess that no conclusion, with any claim to universal validity, is attainable. Be this as it may, the duty alike of the student and of the politician is clear: to investigate and then to judge.

II. THE HOUSE OF LORDS

Analytical and Historical Sketch

'While the privileges of our Peers, as hereditary legislators of a free people, are incomparably more valuable and dignified, they are far less invidious in their exercise than those of any other nobility in Europe.'—LORD JOHN RUSSELL.

AT a very early stage in its evolution the English Parliament assumed a bicameral form.[1] This form, except for a short time during the revolutionary period of the seventeenth century, has been retained continuously down to the present time. That this peculiar structure has contributed not a little to its stability, perhaps even to its survival, will be denied by no one who realizes the fate which overtook the States-General of France and the Cortes of Castille and Aragon—institutions coeval with itself. Nevertheless, the bicameral arrangement was due, like most English institutions, to a series of events apparently fortuitous. Like the States-General in France and the Cortes in Spain, the English Parliament was, in its origin, based upon the principle of *Estates*.[2] The model Parliament of Edward I, summoned to meet at Westminster in 1295, represented this principle. Members of the Baronial Estate were summoned in person; the Estate of the Clergy, partly in person and partly by representatives;

[1] 'The two Houses of Parliament had, at least since the accession of the House of Lancaster, been fully recognized as co-ordinate, equal, and mutually independent assemblies.' Thus Dr. Stubbs wrote (*Constitutional History*, § 771), but Dr. Pollard (*Evolution of Parliament*, pp. 122 *seq.*) has accurately pointed out that the separation into two Houses is not even now complete. For on all its more formal occasions (as at the Opening of Parliament by the King, Prorogation, and the Royal Assent to Bills) Parliament meets as a single assembly. Not until the year 1547 did the House of Commons keep a separate *Journal*, and the chief secretarial officer (though he sits in the House of Lords) is styled the Clerk of the *Parliaments*. The House of Commons has its own Clerk.

[2] This may be described as the classical view, adopted by Bishop Stubbs; but Dr. Pollard (*op. cit.*, c. iv) takes a contrary view and supports it with great erudition.

the Estate of the Commons, wholly by representatives; and all for the primary purpose of contributing to the financial necessities of the Crown and Kingdom. From this fact it might have been anticipated that Parliament would eventually organize itself either in a single chamber or, more probably, in three chambers, corresponding to the three Estates. That it did not permanently assume either of these forms was due to two facts: (i) the secession of the representatives of the capitular and parochial Clergy; and (ii) the junction effected in the fourteenth century between the Knights of the Shire and the representatives of the Boroughs and Cities. The 'lower' Clergy, imbued with a strong separatist spirit, preferred to vote their money-grants to the King in their purely clerical assemblies—the Convocations of Canterbury and York—instead of taking that part in the national assembly of the realm which Edward I was wisely anxious to assign to them. The Knights of the Shire might naturally have been expected to associate themselves politically with the Baronage, the class to which socially they belonged. And for some years after 1295—for how many precisely it is impossible to say—they would appear to have sat and acted with them.[1] By the middle of the fourteenth century, however, the Knights had definitely separated themselves from the Baronage, and had effected with the Burghers a union, which was destined to endure, in a 'Commons' House of Parliament. Meanwhile the Spiritual Peers—the Bishops and the Abbots—had united with the Temporal Barons in a House of Lords; and thus, before Parliament was a century old, it had definitely assumed the form which, save for a brief and exceptional interval, it has ever since retained.

That the adoption of a bicameral form was in itself of first-rate significance I have already hinted; but it was even more important that the different elements of which Parliament consists should have disposed themselves as they did. Had the Knights of the Shire continued to

[1] Hallam, *M. A.*, pp. 476–7.

adhere, as they might naturally have done, to the Barons, the history of the English Parliament might not improbably have resembled that of the French States-General or the Spanish Cortes. The latter disappeared finally in the sixteenth century, the former just managed to survive into the seventeenth. The failure of representative institutions in France and Spain was not due to any single cause, least of all to the absence of the bicameral structure. But it must be attributed in no small measure to the success with which the Crown was able to fan the embers of discord between the several Estates, and particularly between the Nobles and the Third Estate. In England such discord was averted and the solidarity of Parliament in its dealings with the Crown was secured by the existence of the Knights of the Shire, and still more by their fortunate association with the Burghers. A glance at the history of county representation will suffice to prove that socially the 'Knights'—certainly down to 1832—belonged, in very large measure, to the same class as the Baronage. Not infrequently they were the sons or brothers of members of the Second Chamber. Their political union with the Burghers was not merely useful in contributing to the weight and dignity of the House of Commons, but formed an invaluable link between the two Houses. Thanks to the existence of this link the kings of England would never, even had they wished it, have been able to drive in a wedge between Nobles and Commons, and to destroy each in turn.

It is, however, with the House of Lords alone that this chapter is concerned.

That House at present (November 1926) consists of 742 members, and is, therefore, by far the largest Second Chamber in the world.[1] Of its members the vast majority owe their seats to hereditary qualification; all but a handful are laymen. Now these characteristics of the House of

[1] But of the Peers twenty-three are Minors. Thus the effective voting strength of the House of Lords is 719. There are twenty-three Peeresses in their own right.

Lords—its large and perhaps unwieldy size, the predominance of the hereditary and lay elements—are all comparatively modern. Down to the sixteenth century, or, to be more precise, down to the dissolution of the great abbeys (1539), the House of Lords was small in numbers and was neither predominantly lay nor predominantly hereditary in composition. The process by which it has been so profoundly altered in character will be described presently; but, in the first place, it is important to analyse the elements of which the House is at present composed. In this way something may incidentally be done to correct the vulgar impression that all—or nearly all—the members of the Upper House sit by a common hereditary title. There are no less than six distinct classes of persons entitled to sit in that House:

(i) Princes of the blood royal, sitting as hereditary Peers of the United Kingdom (3).
(ii) Temporal Peers of England, of Great Britain, and of the United Kingdom (666).
(iii) Spiritual Peers: 2 Archbishops and 24 Bishops (26).
(iv) Representative Peers of Scotland (16).
(v) Representative Peers of Ireland (26).
(vi) Lords of Appeal in Ordinary (6).

Leaving on one side for the moment the first two categories, which may, perhaps, be more strictly regarded as one, there are at present seventy-three members of the Upper House who do not hold their seats by hereditary tenure.

Of these the Bishops represent the most ancient element in the House. They had a place not only in the *Commune Concilium* of the Norman and Angevin Kings, but in the Anglo-Saxon Witenagemot; to the model Parliament of 1295 they were naturally, therefore, summoned by Edward I. Whether they sat as Bishops—as rulers of the Church,—or as 'barons'—tenants-in-chief of the Crown,—is a technical point which need not detain us. With the Bishops came the Abbots; but the Abbots resented the obligation to attend Parliament, and insisted that atten-

dance was not incumbent upon them unless they held their lands by military tenure. Thus, whereas 72 Abbots were summoned to Parliament by Edward I, the number had fallen to 27 by the middle of the fourteenth century, and at that figure it remained until the abbeys were dissolved by the Act of 1539. But despite the disinclination of the Abbots to take their place in the Great Council of the nation, the spiritual Peers with brief exceptions generally commanded a majority in the Upper House until the Reformation. Thus in the first Parliament of Henry V there were 47 spiritual Peers as against 38 lay Peers; in the first of Henry VI there were 46 as against 23; in the first of Henry VII, 48 as against 29; and in the first of Henry VIII, 48 as against 36. The Reformation permanently altered these proportions. The Bishops, it is true, were increased by Henry VIII's creations[1] temporarily to 27 and permanently to 26; but the Abbots, Priors, and Masters of Orders finally disappeared, and from that day to this the number of lay Peers has steadily, and at times rapidly, increased. The Bishop of Westminster took his place with the other new creations of Henry VIII in the last Parliaments of that reign and the first of the succeeding one, but the new see was abolished in 1550, and from the reign of Edward VI to that of Edward VII the number of spiritual Peers has remained, with two exceptions, constant.

The first exception was due to the action of the Long Parliament. The Bishops were deprived of their seats in Parliament in 164½, and remained excluded for twenty years. Immediately after the Restoration the Bishops Exclusion Act was repealed (1661) as containing 'several alterations prejudicial to the constitution and ancient Rights of Parliament and contrary to the laws of this land', and as having been 'by experience found otherwise inconvenient'. The second exception was due to the Irish

[1] Henry VIII founded the new bishoprics of Bristol, Chester, Gloucester, Oxford, Peterborough, and Westminster, raising the total number to twenty-seven; but that of Westminster is now represented only by a Dean and Chapter.

Union. From 1801 down to the disestablishment of the Anglican Church in Ireland in 1869, the Bishops' bench was reinforced by the presence of four Irish Bishops. Apart from this temporary augmentation the number has not varied, despite the large increase in the Anglican Episcopate. The Order in Council creating the new see of Ripon in 1836 gave to the new Bishop a seat in Parliament, but the fusion of the sees of Gloucester and Bristol prevented an increase in the number of spiritual Peers. The successive Acts of Parliament under which new bishoprics have been created for Manchester, Truro, St. Albans, Liverpool, Newcastle, and several other Dioceses, have expressly provided against any increase in the number of episcopal representatives in Parliament. The two Archbishops, the Bishops of London, Durham, and Winchester, and the twenty-one senior Bishops have seats, the remaining Bishops being excluded. Various proposals have from time to time been made to 'relieve the Bishops of their legislative duties and give them the opportunity of devoting themselves exclusively to the charge of their dioceses'.[1] But a recent and very influential Committee of the House of Lords, 'having in mind the immemorial position of the Bishops in the House of Lords, and the special authority with which they are able to speak on many subjects, would regret to see the connexion dissolved and their complete withdrawal from the House. In view, however, of the large reductions proposed in the aggregate numbers of the House the Committee recommended that the episcopal representatives should in future number ten: the two Archbishops to sit by right during the tenure of their sees; and the remaining body of Bishops to elect eight of their number to represent them for the duration of each Parliament'.[2]

But this reform is still in the future; meanwhile twenty-six Bishops continue to be summoned to the Parliaments of George V, as they were summoned to those of Edward

[1] I borrow the diplomatic language of the Report of Lord Rosebery's Committee.

[2] *Report of Select Committee* (1908).

VI, and as the twenty Bishops of that day were summoned to that of Edward I.

Of the sixteen representative Scottish Peers little need be said. They sit in virtue of the Act of Union (1707), being elected by the general body of Scottish Peers for the duration of a single Parliament. At the time of the Union there were nearly as many Scottish as English Peers.[1] But owing partly to the fact that no new Scottish Peerages can be created, partly to natural causes, and most of all to the fact that many Scottish Peers have been raised to Peerages of the United Kingdom, there are now only sixteen Scottish Peers who are not Peers of Parliament. The Scottish Peers cannot, therefore, complain of under-representation in the Imperial legislature, and the day may soon come, as Maitland predicted, when 'there will be no more than sixteen Peers of Scotland, and they will be able to elect themselves'.

The Irish Peers are now represented by twenty-six of their number in the House of Lords. They were elected by the whole body of Irish Peers and (unlike the Scottish Peers) for life. An Irish Peer who has not been elected to sit in the House of Lords is eligible for election by any constituency in Great Britain—a privilege not enjoyed by the Scottish Peers. It was further provided by the Act of Union that for every three Irish Peerages which became extinct one new Peer might be created until the number was reduced to one hundred, after which one new peerage might be created for every one extinguished.

Since the passing of the Irish Free State Constitution Act (1922) the position of Irish Peers in the House of Lords has been entirely anomalous. In fact there are still twenty-six Representative Peers in that House, but no vacancies, created by death, have been filled up. Moreover, there are still fifty-four Irish Peers (of whom two have seats in the House of Commons) who are not Peers of Parliament. The Act of Union (1800) has never been repealed. Northern Ireland remains an integral part of the United Kingdom. Southern Ireland has become a Dominion with the same

[1] 154 to 168, according to Maitland, *Constitutional History*, p. 349.

constitutional status as other Dominions. Meanwhile, the office of Lord Chancellor of Ireland has been abolished, and there is consequently no one to whom, under the provisions of the Act of Union (1800), a writ for the election of a Representative Peer can legally be addressed. But can the rights of Irish Peers be made void by the abolition of the machinery to enforce them? And what becomes of the rights of Peers who belong to Northern Ireland?[1] Whatever the answer to the questions may be, the present position is in the highest degree anomalous and obscure, and admittedly ought to be cleared up. The English Law Officers advised in 1923 that, in the event of a vacancy occurring, no action to fill it could be taken without further legislative provision, but that existing Representative Peers should retain their right to sit.[2]

The presence of legal life-peers in the House of Lords is of still more recent date. An attempt made in 1856[3] to confer a life peerage upon a distinguished lawyer was foiled by the action of the Peers themselves. But by the Appellate Jurisdiction Act of 1876, statutory power was given to the Crown to appoint immediately two 'Lords of Appeal in Ordinary', with further power in certain events to appoint two more such 'Lords', to assist the hereditary Peers in the discharge of their functions as the final court of appeal. These 'Law Lords', of whom there are now six,[4] receive salaries, hold office during good behaviour, and are entitled to rank as Barons. Their tenure of seats in the Upper House was, under the Act of 1876, made dependent on the tenure of judicial office; they were, therefore, like the Bishops, to be official 'Lords of Parliament'. By a subsequent amendment of the Act (1887) they may retain their seats and privileges for life, notwithstanding resignation of office. They have become, therefore, life-peers. But their number is limited to six. The Act of 1876, though

[1] *Lords Debates*, 23 March 1927.

[2] *Parliamentary Debates (Commons)*, vol. 162, cols. 1235–6.

[3] See *infra*, pp. 16 and 39.

[4] Two Lords of Appeal have received hereditary Peerages. Hence the divergent figures on pp. 7 and 8 *supra*.

not curtailing the right of any Peer to take part in the judicial proceedings of the House, further provides that no appeal can be heard or determined in the House of Lords unless three of the following persons are present: the Lord Chancellors (or ex-Chancellors) of Great Britain and of Ireland, Judges or ex-Judges of the High Courts of Great Britain and Ireland, or of the Judicial Committee of the Privy Council, and Lords of Appeal in Ordinary. The principle of 'official' Peers, though limited at present in application, is an important one, and is capable of expansion.

There remains to be considered the fifth element of which the Upper Chamber is composed—the hereditary Peers of England and the United Kingdom. These number at present (including three Peers of the Blood Royal) no fewer than 666, or more than five-sixths of the whole House. The vast majority of the Peerages which they hold are of comparatively recent creation. It has been said that 'counting English, Scottish, and Irish Peerages, there are not a hundred which can be traced as far as the Middle Ages, and about half of these have been merged in newer and higher titles'.[1] To the first Parliament of Henry VII there were summoned, as we have seen, only twenty-nine lay Peers. The Tudors, and still more the Stuarts, were lavish in creations, and by the Revolution of 1688 the lay Peers numbered 166. Nearly thirty were added during the short reigns of William III and Anne. Queen Anne, indeed, created twelve new Peers in one batch in order to facilitate the task of the Tories in concluding the Peace of Utrecht.

It was with the intention of stopping such wholesale creations and of maintaining the oligarchical character of the Upper House that in 1719 and 1720 the Peerage Bill was introduced by the Earl of Sunderland. Sunderland

[1] Maitland (*C. H.*, p. 248), who by Middle Ages means, I presume, Prae-Tudor days.

Of the Peers who voted against the Reform Bill in 1832, there were, I believe, only four whose creation was prior to 1790.

represented the quintessence of Whiggism—Whiggism of the type which triumphed in 1688, and regarded with equal suspicion the Crown and the people—the principles of monarchy and of democracy. His Peerage Bills proposed that the number of Peers of Great Britain should be fixed for all time. The Crown was to have the right of creating one new Peer for every Peerage which became extinct, and of adding to the existing Peerage six new ones, but that was to be the permanent limit. Scotland was to be represented in perpetuity by twenty-five hereditary, in place of the sixteen elected Peers. The general effect, therefore, of the Bill would have been to fix the numbers of the lay Peerage at about two hundred. The main argument for the Bill was that it was undesirable that successive factions should have the power of swamping the House of Lords, and that the House of Commons could never be really independent so long as its leading members were constantly looking to the Crown for promotion to the Upper House.

This mischievous proposal was defeated by the sturdy common sense of Sir Robert Walpole, and it may be doubted whether in his whole career he ever performed a greater service to his country. Had the Bill become law, the Peerage, instead of being constantly recruited from the best brains of the country, would have become an exclusive and oligarchical caste; the Crown would have been deprived of one of its most valuable prerogatives; above all, the safety-valve of the Constitution would have been permanently closed. Between two legislative chambers, nominally co-ordinate in authority, conflicts must from time to time occur. The only means known to the Constitution of terminating a deadlock—a contingency most elaborately provided for in most modern Constitutions—is the Prerogative by which the Crown may create an unlimited number of new Peerages. It may be objected that as a matter of fact the Royal Prerogative has never been so used since 1719, and that the Sovereign has never followed the precedent set by Queen Anne in 1711. This is

true; but the numbers of the Upper House have more than tripled since 1719; the House has become fairly representative of the talent of the nation; success in every department of life,—in Letters, in Art, in Science, in business, in the field, in the forum, in the Church,—is recognized by admission to that House, and thus the Peerage has been kept in close touch with all sides of national activity. Finally, it must be remembered that the Royal Prerogative, though never exercised to effect a single dramatic coup, has, at every great crisis in our parliamentary history, been held in reserve, and has been known to be so held. This knowledge has actually averted revolution, and has preserved the Constitution intact. We were never nearer to revolution than in the Reform Bill crisis of 1832. Twice the Lords had rejected or wrecked Reform Bills on which the constituencies and still more the unenfranchised citizens had manifestly set their hearts. Lord Grey's ministry had resigned; the Duke of Wellington had failed to form an alternative ministry; a deadlock was imminent. It was solved, as in the last resort it can only be solved, by an intimation from the King that he was prepared to create a sufficient number of new Peers to carry the measure through the House of Lords. The situation, as we shall see was exactly reproduced in 1911. In neither case did the new Peers ever see the light; the reserve forces of the Constitution were never called out; but it was only the knowledge of their existence which averted war.

The Peerage Bill of 1719 and the averted deadlocks of 1832 and 1911 represent the gravest crises in the modern history of the House of Lords. But since 1832 there have been several decisions of the House itself which go to the root of the theory of Peerage and of the qualifications of a Lord of Parliament. These demand a passing reference.

In the first place, it is important to emphasize the distinction suggested in the previous paragraph. A *Peer* and a *Lord of Parliament* are far from being convertible terms. 'It would seem', says Sir William Anson, 'to be of the essence of the Peerage that it should carry with it

hereditary right.'[1] Under this definition Bishops[2] and Lords of Appeal in Ordinary could not be included among Peers: but they are undeniably Lords of Parliament. Conversely there are some Scotch Peers, and many Irish Peers who, though possessing all the attributes of Peerage, are not entitled, unless specifically elected, to a seat in the House of Lords. This point was raised in the clearest possible manner by the famous *Wensleydale Peerage case* in 1856.

It was thought desirable, at that time, to reinforce the House of Lords for the discharge of its functions as the Supreme Court of Appellate jurisdiction, by the creation of life Peers possessed of special legal qualifications. Accordingly the Queen was advised to confer a peerage for life upon Sir James Parke, lately a baron of the Court of Exchequer, under the style of Baron Wensleydale. Letters patent were formally issued in this sense, but the House of Lords demurred to the admission of a life Peer to a seat in the 'hereditary' chamber. There could be no reasonable doubt that the Crown had conferred such peerages in times past, but it was admitted that no case had occurred for the last four hundred years, and it was contended that while the Crown retained the right to create Peers for life, such a peerage did not carry with it the privilege of a Lord of Parliament. The House, after prolonged investigation of precedents, eventually resolved 'that neither the letters patent nor the letters patent with the usual writ of summons issued in pursuance thereof can entitle the Grantee to sit and vote in Parliament'. The Crown acquiesced, and solved the immediate difficulty by conferring upon Baron Parke an ordinary descendible peerage. Whether the Lords were legally right, it is not for a layman to say; it is

[1] *Law and Custom of the Constitution*, i. 168, and cf. Freeman, 'The special character of the British peerage, as distinguished from privileged orders in any other time or place, springs directly from the fact that the essence of the Peerage is the hereditary right to a personal summons to Parliament.' *Essays*, iv. 436.

[2] 'It has been held, at least from the seventeenth century, that the Spiritual Lords, though Lords of Parliament equally to the Temporal Lords, are not, like them, *peers*.' Freeman, *Essays*, iv. 434.

generally held that they were; but the political expediency of the decision is more open to question. It is true, as we have already seen, that the reinforcement of the Supreme Court of Appeal has been secured by statute. To this very limited extent the Crown has now a right of creating life Peerages. It is true also that had the right been unlimited it might have placed in the hands of the ministry of the day a dangerous weapon, and might have threatened if not destroyed the independence of the Second Chamber. Nevertheless, some of the best friends of an 'hereditary' House of Lords have not ceased to regret the decision in the Wensleydale case as one of many lost opportunities for strengthening its authority. This is a point which may more properly be discussed when we proceed to examine the schemes proposed from time to time for the reform of the House of Lords. Meanwhile, it should be observed that the Wensleydale case raised questions of first-rate importance, both as to the precise nature of a peerage and as to the extent or limitations of the Royal Prerogative in regard to the creation of Peers.

Not less fundamental were the issues raised, a few years later (1861), by the *Berkeley Peerage case*. Sir Maurice Berkeley, being admittedly 'entitled to the castle and lands constituting what had been the territorial barony of Berkeley' petitioned the Queen that he might be declared Baron of Berkeley, and might receive a writ of summons to Parliament. Technicalities apart, the petition raised the question whether 'barony by tenure' still existed, and whether the holder of a territorial barony could claim as of right a seat in the House of Lords. The decision of the House of Lords was adverse to Sir Maurice Berkeley, and it was thereby authoritatively laid down that no one can any longer claim a 'barony by tenure'. A further question, however, remained: had there ever been a time when such a claim would have been held valid? This question goes to the root of the matter, and necessitates a brief sketch of the history of the English Peerage and of the House of Lords.

The House of Lords is lineally descended from the Norman Council, which in its turn may claim descent from the Anglo-Saxon Witenagemot. Whether the Witan contained theoretically any popular or democratic element must still be regarded as an open question. But it is certain that in practice it was a small, aristocratic, or, more accurately, official body. The Bishops would seem to have contributed its most permanent element; for the rest it generally consisted of Abbots, Ealdormen or Earls, and *Ministri* or King's Thegns. The Council Court or *Curia* of the Norman Kings was a body not less indeterminate. 'Thrice a year', says the Saxon Chronicle, 'King William wore his Crown every year he was in England; at Easter he wore it at Winchester, at Pentecost at Westminster, and at Christmas at Gloucester; and at these times all the men of England were with him—archbishops, bishops, and abbots, earls, thegns, and knights.' These may be taken to have represented generally the leading men of the realm. Did they attend the Council or Court in view of any more specific qualification—common to all? To this question no certain or final answer can be given; but it seems tolerably clear that whatever the original theory, if 'theory' there was, it was quickly superseded by the idea that upon all tenants-in-chief,—upon all, that is, who held land directly from the King,—there rested an obligation to attend the King's Council. 'The Earldoms', as Bishop Stubbs puts it, 'have become fiefs instead of magistracies, and even the Bishops had to accept the status of *barons*' (i.e. tenants-in-chief).

As time goes on the functions of the Council become more clearly defined. The administrative and judicial work is for the most part assigned to a Committee (*Curia Regis*). Its composition becomes also more determinate. In particular a distinction is recognized between the greater and lesser tenants of the Crown. The former (*barones majores*) come to be distinguished by a personal summons to attend the Council, and by the right to pay their feudal dues directly into the King's Exchequer. The

latter (*barones minores*) are summoned to attend through the Sheriff of the County, and through the same functionary pay their dues to the Crown. This usage dates back at least as far as Henry II, and receives legal sanction from the famous clause of Magna Carta: 'To obtain the common counsel of the Kingdom we will cause to be summoned the archbishops, bishops, abbots, earls and greater barons under seal (*sigillatim*) by our letters; and besides we will cause to be summoned *in general* through our sheriffs and bailiffs all those who hold of us in chief.'[1] Another clause of the Charter provides that the heir of a 'baron' shall pay a hundred marks for succession duty (*relief*), the heir of a knight shall pay only a hundred shillings. It has been surmised and with much show of probability, that the distinction of *relief* corresponds with the distinction in the manner of summons. Be this as it may, it is clear that as time goes on there is a progressive circumscription in the 'baronial' class. To the Welsh war of 1276 no less than 165 'barons' received a special summons; to the model Parliament of 1295 Edward I summoned only 41. Already we seem to see a distinction manifesting itself between 'Barons' and 'Lords of Parliament'. Tenure begins to have less and less political significance. The qualification of 'barony' gradually changes. A 'baron' is no longer a man with much land held direct from the King. He is the man singled out by the King for the privilege or duty of a special summons to the 'House of Lords'. Thus *barony by writ* supersedes *barony by tenure*. But who was entitled to receive the writ of summons? This question is not perhaps susceptible of a positive answer, but the conclusions now generally accepted are thus stated by Sir William Anson: 'that at any rate from the time of Edward I the King used his discretion in respect of the special summons by writ; that as a matter of fact those summoned were usually, though not invariably, tenants of the Crown and tenants of baronies; but that persons were summoned who not only were not tenants of baronies, but were not tenants of the

[1] *M. C.* § 14.

Crown at all. The estate of the baronage was constituted and defined by the exercise of the royal prerogative in issuing the writ of summons'.[1]

A further question now arises: did the receipt of such a writ confer any hereditary right to its continuance?[2] Whether this was originally intended is more than doubtful; but it is clear that the usage was gradually established, and in the case of the Clifton barony in 1673 it was definitely decided that the King could not withhold the writ of summons from the heir of a person who had been once summoned and *had taken his seat*. This latter point—the necessity that to establish the right the summons should have been obeyed—was finally decided by the *Freshville case* in 1677. But meanwhile an important change had taken place in the mode of creating baronies. The dignity of an Earl, a Duke (dating from 1337), a Marquis (from 1386), and a Viscount (*temp.* Henry VI), was conferred by charter or Letters Patent. Richard II was the first King to confer a barony in the same manner, and from the time of Henry VI it has become the established method of creation. A peerage is now invariably created by Letters Patent, after the issue of which the new peer receives a writ of summons to take his place in the House of Lords. Thus there came into existence an hereditary peerage and a House of Lords, consisting, as we have seen, in an increasing degree of hereditary peers.[3] The powers of that House, and its functions, legal and political, will form the subject of a later chapter.

[1] *Law and Custom of the Constitution*, i. 173.

[2] 'This right to the hereditary summons is the kernel round which the personal privileges of the peers have grown.' Freeman, *Essays*, iv. 439.

[3] The terms 'peer' (originally signifying, of course, only 'equal') and 'peerage' came into use in the fourteenth century. The first use of the term 'peer' as equivalent to a member of the House of Lords is found in *Act* v. *Despensers*, 1322; Stubbs, ii. 176–84, and *Lords' Report*, i. 281.

III. THE UNICAMERAL EXPERIMENT

'The Commons of England assembled in Parliament, finding by too long experience that the House of Lords is useless and dangerous to the people of England to be continued, have thought fit to ordain and enact . . . that from henceforth the House of Lords in Parliament shall be and is hereby wholly abolished and taken away.'—'*Act*' of the Long Parliament (19 March 1649).

'That the supreme legislative authority of the Commonwealth . . . shall be and reside in one person and the people assembled in Parliament.'—*Instrument of Government*, § 1 (16 December 1653).

'That your Highness will for the future be pleased to call Parliaments consisting of two Houses.'—*Humble Petition and Advice*, § 2 (25 May 1657).

'That the Government is and ought to be by King, Lords, and Commons.'—*Resolution of Convention Parliament* (1 May 1660).

IT has been shown in the preceding chapter that the English Parliament assumed almost from the first a bicameral form. Except for eight years in the middle of the seventeenth century, it has retained that form ever since. The period of exception occurred, indeed, in revolutionary days, but the results of the experiment of a unicameral legislature are not, on that account, the less pregnant with political instruction and suggestiveness. It is the purpose of the following pages to explain the circumstances under which the experiment was attempted, and to inquire whether, and if so how far, they were sufficient to invalidate any conclusions which we may be tempted to draw from its undeniable failure.

Reduced to a mere fraction of its original numbers by the drastic purge of Colonel Pride, the Long Parliament had set up a special Court of Justice to try Charles I. Under the sentence of this irregular tribunal the King had been sent to the scaffold on 30 January 1649. Six weeks later the same 'Rump' proceeded to pass an 'Act' declaring that the office of King was 'unnecessary, burdensome, and dangerous to the liberty, safety, and public interest of the people', and that it should be forthwith abolished (17 March 1649). This Act was immediately followed

(19 March) by another which declared that 'the Commons of England . . . finding by long experience that the House of Lords is useless and dangerous to the people of England to be continued, have thought fit to ordain and enact . . . that from henceforth the House of Lords in Parliament shall be and is hereby wholly abolished and taken away; and that the Lords shall not from henceforth meet or sit in the said House, called the Lords' House, or in any other house or place whatsoever, as a House of Lords; nor shall sit, vote, advise, adjudge, or determine of any matter or thing whatsoever, as a House of Lords in Parliament'. Further: provision was in the same 'Act' made that 'such Lords as have demeaned themselves with honour, courage, and fidelity to the Commonwealth' should be capable of election to the unicameral legislature. It is important to note that the 'Act' of 19 March 1649, having neither the sanction of the Crown nor of the House of Lords, had no more legal force than any other resolution of the House of Commons; as the work of a House of Commons from which the majority was excluded by force of arms, it had even less than the usual moral significance.

The rump of the Long Parliament having thus rid itself of the King and of the Second Chamber, proceeded to render itself independent of the electorate and to perpetuate its own power; to make itself, in a word, politically and legally sovereign. Under the Act of 11 May 1641,—an Act which had of course received the assent of the King and the House of Lords,—the Long Parliament could not be dissolved, prorogued, or adjourned except by Act of Parliament 'passed for that purpose'. It is noticeable that the Act contained a further provision that 'the House of Peers shall not at any time . . . during this present Parliament be adjourned unless it be by themselves or by their own order'. But, this notwithstanding, the Act was deemed to be still in force, and it did provide a certain measure of sanction for the impudent claim now put forward by the remnant of the House of Commons. On 4 January 1649 that House had resolved that 'the Com-

mons of England in Parliament assembled, being chosen by and representing the people, have the supreme power in this nation'. Never, as Sir Charles Firth says, was the House 'less representative than at the moment when it passed this vote. By the expulsion of royalists and members during the war, and of Presbyterians in 1645, it had been, as Cromwell said, "winnowed and sifted and brought to a handfull." When the Long Parliament met in November, 1640, it consisted of about 490 members; in January, 1649, those sitting or at liberty to sit were not more than ninety. Whole districts were unrepresented.... At no time between 1649 and 1653 was the Long Parliament entitled to say that it represented the people.'[1] Nevertheless the position it assumed had in it this element of strength: in the absence of a King, a House of Lords, and a written Constitution, there was absolutely no legal check upon its unlimited and irresponsible authority. 'This', said Cromwell, addressing his second Parliament, 'was the case of the people of England at that time, the Parliament assuming to itself the authority of the three Estates that were before. It had so assumed that authority that if any man had come and said, "What rules do you judge by?" it would have answered, "Why, we have none. We are supreme in legislature and judicature."' Supreme the Rump claimed to be; but it ignored the dominant factor in the situation—the new model army and its general, and it chose to forget that its usurped authority rested in fact upon the power of the sword. It was soon uncomfortably reminded of this fact. By 1651 there was a clamorous demand for a settlement of the kingdom. The enemies of the Commonwealth were now scattered; Cromwell had subjugated Ireland and Scotland; the fleet, organized by Vane and commanded by Blake, had swept Prince Rupert and the Royalists from the seas; while Cromwell himself had finally crushed their hopes at home by the 'crowning mercy' of Worcester (3 September 1651). The victorious party had now leisure and opportunity to quarrel among

[1] *Cromwell*, p. 235.

themselves. Petitions poured in from the army praying for reforms—long delayed—in law and justice; for the establishment of a 'gospel ministry'; above all, for a speedy dissolution of the existing Parliament. The officers were ready to employ force to effect the last object: but Cromwell was opposed to it and restrained his colleagues. During the autumn of 1651 a series of conferences as to the 'settlement of the nation' were held at Speaker Lenthall's. The lawyers like St. John, Whitelocke, and Lenthall himself, already favoured a restoration of one of the late king's sons; the officers wanted a republic; Cromwell cautiously expressed his opinion that 'a settlement with somewhat of monarchical power in it would be very effectual'. Meanwhile the Rump pushed on their 'Bill for a New Representation'. This Bill suggested that the New House should consist of 400 members, but it contained, in addition, the amazingly impudent proposals that the existing members were to retain their seats without re-election, and that they should have a veto upon all new members who should be elected not merely to the next but to all future parliaments. Against this the officers strongly protested; even Cromwell's patience was exhausted: 'You must go, the nation loathes your sitting.' Later on, he gave his opinion of the 'Perpetuation Bill': 'we should have had fine work then . . . a Parliament of four hundred men executing arbitrary government without intermission except some change of a part of them; one Parliament stepping into the seat of another, just left warm for them; the same day that the one left, the other was to leap in. . . . I thought and I think still, that this was a pitiful remedy.' On 20 April 1653 the Rump was expelled. 'So far as I could discern when they were dissolved, there was not so much as the barking of a dog or any general and visible repining at it.'

In his estimate of the position and policy of the unicameral Rump Cromwell was undeniably right. It was in plain truth the 'horridest arbitrariness that ever existed on earth'. It was held that the Rump had become a sort of residuary legatee of all the powers previously possessed

by either House. 'Whatsoever authority was in the Houses of Lords and Commons the same is united in this Parliament.' Such was the theory held by Lord Chief Justice Glyn. In particular the judicial power of the House of Lords was held to be vested in the Rump, while Major-General Goffe went so far as to assure his fellow members 'that the ecclesiastical jurisdiction by which the Bishops once punished blasphemy had since the abolition of the bishops devolved also upon the House'.[1] The union of executive, legislative, and judicial authority more than justified Cromwell's famous description. No man's person or property was safe. It was a repetition of all the arbitrary tribunals of the régime of *Thorough* rolled into one. Hence 'the liberties and interests and lives of people not judged by any certain known Laws and Power, but by an arbitrary Power . . . by an arbitrary Power I say: to make men's estates liable to confiscation, and their persons to imprisonment—sometimes by laws made after the fact committed; also by the Parliament's assuming to itself to give judgment both in capital and criminal things, which in former times was not known to exercise such a judicature'.[2]

That Cromwell did not overstate the case against the arbitrary behaviour of a House of Commons, acting without a sense of immediate responsibility to the nation, and unchecked by any external authority, has lately been proved in detail by the researches of Sir Charles Firth. But the story is not yet complete.

To the 'Rump' there succeeded the Puritan Convention, popularly known as the 'Barebones' Parliament'. This device did not work, and in December 1653 a Committee of Officers, assisted by a few civilians, produced the exceedingly interesting draft constitution embodied in *The Instrument of Government.* This document provided, in the first place, for a drastic scheme of parliamentary reform, embracing both the revision of the franchise qualification and the redistribution of seats; parliaments were to be

[1] Firth, *Last Years of the Protectorate*, i. 9.

[2] *Cromwell*: Speech iii, Carlyle's edition, vol. iv, p. 50.

elected triennially, and to remain in session for not less than five months; Ireland and Scotland were, for the first time, to be represented at Westminster; but the two points which specially concern us were: (i) that the legislative power was vested in 'one person and the people represented in parliament', i.e. in a single chamber; and (ii) that the constitution itself was to be 'rigid', the Legislature having no power of amending it. The 'single person' was to have only a suspensive veto on Bills presented to him by Parliament. If within twenty days he had not given his consent, nor succeeded in inducing Parliament to withdraw the Bill, it became law, 'provided such Bills contain nothing in them contrary to these presents'—in other words, provided they were not repugnant to the written Constitution.

The *Instrument* represented an honest attempt to regain the path of constitutional decorum, to clothe the military dictatorship with the form of law. But it met with the usual fate reserved for attempts to square the circle, to reconcile irreconcilables. The 'single chamber' when once elected showed no disposition to accept the 'fundamentals' of the *Instrument*. Despite the angry admonitions of the Protector it insisted upon questioning the 'authority by which it sat'; regarding itself, in fine, as not merely a legislative but a constituent assembly. As a result, the Protector dismissed it at the first legal opportunity (22 January 1655). 'The people', he declared, 'will prefer their safety to their passions, and their real security to forms. when necessity calls for support.' For the next eighteen months England was delivered over to the entirely arbitrary rule of the Major-Generals. But as the year 1656 advanced the Protector needed money for the Spanish war, and in September a Second Parliament assembled. Great efforts had been made to secure the election of the well-affected, but even so it was found necessary to exclude as many as one hundred irreconcilables.

This renewed 'sifting and winnowing' did not solve the difficulty. There were in truth only two genuine alter-

natives: 'government by consent' or government by the sword. The 'honest republicans', like Ludlow, wanted the former. 'What would you have?' asked Cromwell of Ludlow. 'That which we fought for,' replied the colonel, 'that the nation might be governed by its own consent.' 'I am as much for government by consent as any man,' said the Protector, 'but where shall we find that consent?'

The question denotes the practical statesman as against the doctrinaire. Government 'by consent' could mean only a freely elected Parliament with constituent powers. Such a Parliament meant a Stuart restoration. And Cromwell knew it. Nevertheless he was almost pathetically anxious to keep the sword out of sight, and arrive, if by any means possible, at a constitutional settlement. 'It is time to come to a settlement and to lay aside arbitrary proceedings so unacceptable to the nation.' The lawyers, the merchants, and the middle party generally were of one mind with the Protector, and early in the year 1657 a demand arose from many quarters for a revision of the Constitution. Alderman Sir Christopher Pack, one of the members for the City of London, was put up to propose a revision—a Second Chamber and increased power for the Protector, who was to be 'something like a king'. By the end of March the demand took practical shape in the *Humble Petition and Advice*. The Protector was to be transformed into a king, with the right to nominate a successor; Parliament was once more to be bicameral; the 'other House' was to consist of not more than seventy and not less than forty members, nominated for life by 'his Highness', and approved by 'this' House; the Commons were again to secure control over their own elections, and none duly elected were to be excluded; the Council of State was to be known henceforth as the Privy Council; a permanent revenue was to be secured to the king, and there was to be toleration for all: 'so that this liberty be not extended to Popery or Prelacy or to the countenancing such who publish horrible blasphemies or practice or hold for licentiousness or profaneness under the profession of Christ.' In a

word, the old Constitution, so far as the circumstances of moment would allow, was to be restored.

Cromwell was well pleased with the scheme, and, had his officers permitted, would have accepted it in its entirety. 'The things provided in the Petition', he declared, 'do secure the liberties of the people of God so as they never before had them.' But on one point the leading officers and the 'honest republicans' were alike immovable: they would have no king. They were backed in their opposition by the extremer Puritan sects. 'We cannot but spread before your Highness our deep resentment of and heart bleedings for, the fearful apostasy which is endeavoured by some to be fastened upon you . . . by persuading you to assume that office which was one declared and engaged against by the Parliament . . . as unnecessary, burdensome and destructive to the safety and liberty of the people.'[1] So ran an address from nineteen Anabaptist ministers in London. Cromwell himself was in two minds. His reason assented to the *Humble Petition*, but policy required that he should not break with the masters of the sword. The extremists prevailed, and after five weeks of discussion and hesitation, Cromwell refused the offer of the crown.

The proposal for a revived Second Chamber was, on the contrary, carried with an unexpected degree of unanimity. The Protector pressed it strongly upon the officers.

'I tell you', he said, 'that unless you have some such thing as a balance we cannot be safe. Either you will encroach upon our civil liberties by excluding such as are elected to serve in Parliament—next time for aught I know you may exclude four hundred—or they will encroach upon our religious liberty. By the proceedings of this Parliament you see they stand in need of a check or balancing power, for the case of James Naylor might happen to be your case. By the same law and reason they punished Naylor they might punish an Independent or Anabaptist. By their judicial power they fall upon life and

[1] Quoted by Firth, *Last Years of the Protectorate* (i. 155)—a work to which, as to the same writer's *Cromwell*, this chapter owes much.

member, and doth the Instrument enable me to control it? This Instrument of Government will not do your work.'[1]

The case against a unicameral legislature was never put with more telling effect. 'By the proceedings of this Parliament you see they stand in need of a check or balancing power.' The appeal to recent experience was irresistible. More horrid arbitrariness had never been displayed by any government. The lawyers were especially emphatic in their demand for some bulwark against the caprice and tyranny of a single elected chamber.

'The other House', said Thurloe, 'is to be called by writ, in the nature of the Lords' House; but is not to consist of the old Lords, but of such as have never been against the Parliament, but are to be men fearing God and of good conversation, and such as his Highness shall be fully satisfied in, both as to their interest, affection and integrity to the good cause. And we judge here that this House thus constituted will be a great security and bulwark to the honest interest, and to the good people that have been engaged therein; and will not be so uncertain as the House of Commons, which depends upon the election of the people. Those that sit in the other House are to be for life, and as any die his place is to be filled up with the consent of the House itself, and not otherwise; so that if that House be but made good at first, it is likely to continue so for ever, as far as man can provide.'[2]

The preference of the lawyers for a bicameral legislature is, however, only according to expectation. They frankly favoured a return as speedy as possible to the old order, if not to the old dynasty. More remarkable is the acquiescence of the soldiers. But they too had come to realize both the inconvenience—to use no harsher term—caused by the sovereignty of a single chamber, and the insufficiency of paper restrictions imposed by the *Instrument of Government*. A freely elected House of Commons meant the restoration of the 'King of the Scots'.

'On reflection, therefore, they were not sorry', as Professor Firth pertinently remarks, 'to see a sort of Senate established

[1] *ap.* Firth, *op. cit.* i. 137–8; i. 141.

[2] *ap.* Firth.

as a check to the popularly elected Lower House, thinking that it would serve to maintain the principles for which they had fought against the reactionary tendencies of the nation in general. They were so much convinced of this that in 1659 the necessity of "a select Senate" became one of the chief planks in the political platform of the army'.[1]

On 8 May Cromwell communicated to the House his final decision not to 'undertake the government with the title of King'. After much debate the *Petition* was amended in accordance with the Protector's views, and in its amended form was definitely accepted on 25 May. On 26 June Cromwell was installed with solemn pomp as Protector, and on 29 January 1658 he met his remodelled Parliament for the first time.

According to the terms of the Petition, the 'other House' was to consist of not more than seventy and not less than forty members, 'being such as shall be nominated by your Highness and approved by this House.' But after much debate the approval of 'this' House was waived and the Protector was authorized to summon whom he would. The task of selection was no easy one, but Cromwell took enormous pains to perform it faithfully. 'The difficulty proves great', wrote Thurloe, 'between those who are fit, and not willing to serve, and those who are willing and expect it, and are not fit.' At last sixty-three names were selected and writs were issued, according to the ancient form, bidding them, 'all excuses being set aside,' to be 'personally present at Westminster . . . there to treat confer and give your advice with us, and with the great men and nobles'. Of the sixty-three summoned, only forty-two responded; among them being Richard, son of the Protector,[2] his three sons-in-law, Fauconberg, Claypole, and Fleetwood, and his brothers-in-law, Desborough and John Jones. Of the seven English Peers summoned, only two consented to serve, one being Cromwell's son-in-

[1] *Op. cit.* i. 142, 3.

[2] Henry also was summoned, but was detained by his duties in Ireland.

law, Lord Fauconberg, the other Lord Eure, a peer of no standing or repute. Lord Say, staunch Puritan though he was, refused to countenance any Second Chamber save the real House of Lords.

'The chiefest remedy and prop to uphold this frame and building and keep it standing and steady is (and experience hath showed it to be) the Peers of England, and their powers and privileges in the House of Lords; they have been at the beam keeping both scales, King and people, in an even posture, without encroachments one upon the other to the hurt and damage of both. Long experience hath made it manifest that they have preserved the just rights and liberties of the people against the tyrannical usurpation of kings; and have also as steps and stairs upheld the Crown from falling upon the floor, by the insolency of the multitude, from the throne of government.'

That being so he thought it unworthy that any ancient peer of England should so far play the traitor to his House and order as to be 'made a party, and indeed a stalking-horse and vizard, to the design of this nominated Chamber'.[1] His sons John and Nathaniel Fiennes had no such scruples, and obeyed the Protector's summons. The latter indeed was one of the most enthusiastic apologists for the 'other House'.

But the Protector had still to reckon with the bitter and pedantic republicans in the House of Commons. Sir Arthur Haslerig, who had refused a place in the 'other' House, was foremost among the querulous critics of the new constitutional experiment. The Protector insisted upon the critical condition of affairs at home and abroad; but to no exhortations would the Commons give heed. Once again they insisted on questioning 'fundamentals', and debating the powers, position, and title to be assigned to the 'other' House. A week of this 'foolery' sufficed to exhaust the Protector's patience, and on 4 February he dissolved Parliament with some passion: 'Let God be judge between you and me.' 'Amen,' responded some of the irreconcilable

[1] *ap.* Firth, *op. cit.* ii. 14.

republicans. Thus ended in confusion and failure the constitutional experiments of the Commonwealth and the Protectorate.

That Cromwell was genuinely anxious to restore the authority of the civil power and to re-establish parliamentary institutions can be doubted only by those who hold him to have been an actor and a hypocrite. That he signally failed is obvious; and it is worth while to pause for an instant in order to analyse the reasons for his failure.

To ascribe it entirely to the abolition of the monarchy and of the House of Lords would be uncandid, though it cannot be doubted that the absence of these balancing elements materially increased Cromwell's difficulties. Nor can it be ascribed wholly to the personality or to the political convictions of Cromwell himself. It is true that Cromwell never gave any indication that he possessed special capacity for the task of constitutional reconstruction; it is truer still that he was unfitted alike by temperament and training for the role of a 'constitutional' ruler in the modern sense. He was quite as determined as Strafford or Charles I to retain in his own hands the control of the Executive, and he refused to assign to any of his Parliaments anything more than a legislative authority to be exercised under the strait limitations of a written constitution. On the other hand, it is hardly matter for surprise that a Parliament which imagined that it had brought a Stuart sovereign to the dust should be reluctant to accept so limited a sphere of action and authority. The Protectorate Parliaments were clearly determined to exercise not merely legislative, but constituent powers; not only to make laws, but to revise and define the Constitution itself. The claim, though reasonable enough in theory, was inconvenient and inopportune. If the sword was ever to be sheathed; if civil government was ever to be restored, it was absolutely necessary, as Cromwell pointed out with homely good sense, to start somewhere;—to agree on certain preliminary fundamentals. Parliament refused to see the necessity, and insisted upon throwing the whole Con-

stitution into the melting-pot on each successive occasion. Thus, the point at issue was precisely what it had been under the Stuart Kings: Where does *Sovereignty* reside? Does it reside in a Constitution, or in Parliament, or in the People? It is difficult to maintain that there was much moral authority behind either of the written Constitutions —the *Instrument of Government* or the *Petition and Advice*. On the other hand, to admit the sovereignty of the people in any genuine and effective sense—to summon a constituent assembly freely elected by the constituencies—would have been, beyond all question, to pave the way for a Stuart restoration. Must *Sovereignty*, then, be vested in a Parliament, either unicameral or bicameral, elected on a notoriously restricted franchise and with manifest disregard for 'popular' rights? The dilemma was in fact complete, the problem insoluble. The more so since it was impossible to avow the naked truth that the real sovereignty in England during the interregnum was vested neither in People, nor in Parliament, nor in paper Constitutions, but in the sword. Cromwell's authority, anxious as he was to ignore or disguise the fact, rested upon the fidelity of his unconquerable Ironsides. His parliamentary experiments, though undertaken in all good faith, were in consequence foredoomed to failure. The failure is, however, unusually instructive. It is a striking illustration of the truths, too often neglected by Englishmen, that parliamentary government is not for all peoples, nor for all times; that it postulates certain conditions; that its success depends on presuppositions by no means invariably fulfilled; that, if it is to work smoothly there must be a tolerable measure of agreement upon 'fundamentals'; that on 'circumstantials' men and parties may indulge in wide difference of opinion; but that on general principles of government they must be in accord. Further, and finally, it would seem to suggest the conclusion that parliamentary institutions, at any rate in England, are workable only with a legislature genuinely bicameral in structure, and under the aegis of a constitutional and hereditary monarchy.

For ten years the English people submitted sullenly, but in the main silently, to a military autocracy thinly disguised under the veil of a parliamentary Commonwealth, or a Protectorate limited by a written Constitution. On the death of the great Protector, himself the leader and general of an irresistible army, the sword and the robe at once came into sharp and open conflict. Richard Cromwell, powerless either to control or to reconcile, was contemptuously pushed aside, and after a short period of confusion, the people got the opportunity—the first they had enjoyed since 1640—of giving expression to their true political sentiment. It is supremely significant that the Convention Parliament affirmed, with its first breath, that 'The Government is and ought to be, by King, Lords, and Commons'. The experiment of a sovereign unicameral Parliament stood confessed a hopeless and irremediable failure.

IV. THE POWERS AND FUNCTIONS OF THE HOUSE OF LORDS

'With a perfect Lower House it is certain that an Upper House would be scarcely of any value. If we had an ideal House of Commons perfectly representing the nation, always moderate, never passionate, abounding in men of leisure, never omitting the slow and steady forms necessary for good consideration, it is certain that we should not need a higher chamber. The work would be done so well that we should not want any one to look over or revise it. And whatever is unnecessary in government, is pernicious. . . . But though beside an ideal House of Commons the Lords would be unnecessary, and therefore pernicious, beside the actual House a revising and leisured legislature is extremely useful, if not quite necessary.'—WALTER BAGEHOT.

WE turned aside in the last chapter to examine the working of the unicameral experiment under the Commonwealth and Protectorate. It is time to resume the thread of the argument, and I propose, therefore, to devote this chapter to a discussion of the legal powers and political functions of the House of Lords.

A brief word must in the first place be said as to the privileges of Peers. These attach, it must be observed, to the *person* of a Peer, and not, as in most foreign countries, to the *family*—a fact which has done much to save England from the curse of a noble caste. The fundamental political right of a Peer, who is also a Lord of Parliament, is to receive from the Sovereign a writ of summons to take his place in Parliament. By the case of the Earl of Bristol (1626) it was established that this writ cannot be withheld at the caprice or discretion of the Crown.[1] Every Lord of Parliament, therefore, not disqualified by infancy, bankruptcy, felony, incapacity to take the oath required by the Act of 1866, or by sentence of the House itself, is entitled to a writ of summons. Peers, like members of the House of Commons, enjoy the privilege of freedom from arrest,

[1] Bristol's case may be held to establish the *collective* privilege of the House of Lords to see that it is properly constituted, rather than the *individual* right of a Peer to receive a writ. Cf. Anson, *Law and Custom of the Constitution*, i. 265.

except in cases of treason, felony, or breach of the peace, and the privilege of freedom of speech. Other privileges enjoyed by Peers are the right to be tried, in cases of treason or felony, by the Peers, and the right of personal access to the Sovereign, the latter being derived from a Peer's position as an hereditary Counsellor of the Crown. Until 1868 a Peer might record his vote by proxy, and he may still enter his individual protest against any decision or vote of the House. All the above may be regarded as individual privileges attaching to the person of a Peer. Collectively the Peers in Parliament possess, like the Commons, the right to determine all questions affecting the constitution of their own House, and the right to commit an individual for contempt of their orders.[1]

The *powers* of the House of Lords are twofold: Judicial and Legislative.

The Judicial functions are in part *original*, and in part *appellate*; but both are alike derived from the antiquarian confusion between the *Curia Regis* and the *Concilium Commune Regni*, between the *Court* and the *Council*, or, to be still more technical, between the *King-in-Council* and the *King-in-his-Council-in-Parliament*. But the antiquarian point need not detain us, though it explains why the Lords exercise these judicial functions as successors in title to the *Commune Concilium*, and not the Commons who descend from a different stock.

As a Court of first instance the Lords have the right, already referred to, of trying their own members in cases of felony and treason. Such a trial is conducted by the Lord High Steward, and all the Peers of Parliament (except the spiritual Peers) are entitled to attend. To them belongs also the right of deciding, at the instance of the House of Commons, all cases of impeachment. For four hundred years—from the fourteenth century to the eighteenth—the trial of a powerful offender at the bar of the Lords on the accusation of the Commons, was the most effective, if not the only, means of enforcing the doctrine of ministerial

[1] See note 1 on preceding page.

responsibility. It was, at the best, a clumsy weapon, and not infrequently broke in the hands of those who desired to wield it. Strafford, for example, was able to defy his enemies so long as they relied upon this procedure. Since the development of the ministerial system and more particularly since the recognition of the doctrine of collective responsibility, the weapon has been virtually discarded as not merely cumbrous but obsolete. The trial of Warren Hastings was the last of the great political impeachments, though this procedure was again adopted when Lord Melville was accused of the peculation of naval funds in 1805. Since that time the device has been dropped. It is now recognized that cases involving a criminal charge are better left to the ordinary Courts, while political blunders are sufficiently and effectually punished by the power of dismissal which the House of Commons has definitely acquired. If the purpose of this treatise were antiquarian it would be necessary to recall the fact that in the reign of Charles II the famous case of *Skinner* v. *the East India Company* (1665) raised an important question in regard to the jurisdiction of the House of Lords as a Court of first instance in civil causes. The claim was hotly contested by the House of Commons, who espoused the cause of the East India Company, and raised a counter-claim of privilege, on the preposterous ground that certain members of the defendant company were members also of that House. The quarrel, thus raised, between the two Houses was unquestionably a pretty one, and it threatened to be persistent. It was only allayed after more than three years' duration by the personal intervention of the King, who persuaded both Houses to erase all records of it from their respective journals. Where victory lay it is difficult to determine. The House of Lords have not, as a matter of fact, reasserted their claim to exercise an original jurisdiction in civil cases where the parties are Commoners; but, on the other hand, they refused to waive their original claim and passed a resolution declaring the proceedings of the lower House in 'entertaining the scandalous petition

of the East India Company against the Lords House of Parliament' to be 'a breach of the privileges of the House of Peers and contrary to the fair correspondency which ought to be between the two Houses of Parliament'.[1] But the case is important, less in reference to the judicial powers of the House of Lords, than as an illustration of the growing jealousy between the two Houses, and in the present connexion, therefore, demands no further discussion.

Far more important is the position of the House of Lords as the supreme and final Court of Appeal. This, like its other judicial functions, is an heritage from the undifferentiated *Curia* or Council of the Norman kings. When the Common Law Courts were 'thrown off' from the ordinary work of the Council, and obtained a distinctive organization and separate official staff, the King-in-Council still retained appellate and equity jurisdiction. In time the equity jurisdiction was similarly differentiated in the Chancellor's Court: but still the main body of the Council —now hardly distinguishable from the Lords in Parliament—retained the supreme appellate jurisdiction. The right thus inherited by the Peers has never seriously been challenged and remains to this day an interesting, though somewhat anomalous, survival. Almost the only disputed point in this connexion was whether an appeal lay to the House of Lords from the Equity, as well as from the Common Law, Courts. The point was raised in the famous case of *Shirley* v. *Fagg* (1675). Hardly had the passions aroused in both Houses by the case of *Skinner* v. *the East India Company* abated when they again broke out on a different issue. Sir John Fagg, a member of the House of Commons, obtained a verdict in the Court of Chancery against Dr. Thomas Shirley. Shirley appealed to the House of Lords who summoned Fagg to answer at the bar. The House of Commons espoused the cause of Fagg, 'contending (1) that members of their House were exempted by privilege from legal process during the Session of Parlia-

[1] Robertson, *Select Statutes and Cases*, pp. 217–21.

ment; (2) that the Lords had no appellate jurisdiction in equity cases'.[1] The House of Lords replied by an assertion of their right to hear an appeal from any inferior Court whatsoever. Neither House would give way and much confusion temporarily ensued. But the ultimate victory lay unquestionably with the Lords. Their appellate jurisdiction in equity cases has been exercised from that time without protest.

It could not, however, be contended that the House of Lords afforded a completely satisfactory Court of Appeal. As the judicial business of the country increased in volume and intricacy its defects in this regard became deplorably apparent.

'For some years after the Revolution', says Erskine May, 'there had not been a single Law Lord in the House—Lord Somers having heard appeals as Lord Keeper. When that distinguished lawyer was at length admitted to a seat in the House of Peers, he was the only Law Lord. During the greater part of the reigns of George II and George III, appeals had been heard by Lord Hardwicke, Lord Mansfield, Lord Thurlow, and Lord Eldon, sitting in judicial solitude; while two mute, unlearned lords were to be seen in the background, representing the collective wisdom of the Court. In later times a more decorous performance of judicial duties had been exacted by public opinion; and frequent changes of administration having multiplied ex-Chancellors, the number of Law Lords was greater than at former periods.'[2]

But things were still far from satisfactory; and in 1856, as we have already seen, an attempt was made to strengthen the House in its judicial capacity by the inclusion of life Peers with legal experience. That attempt was foiled by the action of the Lords themselves, and in 1873 they went near to losing for ever their historic jurisdiction. The *Supreme Court of Judicature Act* of that year extinguished it altogether, but before the Act came into operation wiser counsels prevailed, and by the Act of 1875 the clause was rescinded. A year later the appellate jurisdic-

[1] Robertson, *op. cit.*, pp. 230–40. [2] *Constitutional History*, i. 291.

of the East India Company against the Lords House of Parliament' to be 'a breach of the privileges of the House of Peers and contrary to the fair correspondency which ought to be between the two Houses of Parliament'.[1] But the case is important, less in reference to the judicial powers of the House of Lords, than as an illustration of the growing jealousy between the two Houses, and in the present connexion, therefore, demands no further discussion.

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tion of the Lords was for the first time placed on a statutory basis by the Act of 1876, which at the same time provided for the creation immediately of two, ultimately of four,[1] life Peers to be known as Lords of Appeal in Ordinary. Henceforward no appeal was to be heard unless three Lords of Appeal were present. These, it should be added, were further defined as the Lord Chancellor, the Lords of Appeal in Ordinary (salaried life Peers), and any other Peers who 'hold or have held high judicial office'. Of these there are now a considerable number in the House of Lords. The legal right of all Peers, learned or unlearned, to take part in the judicial work of the House remains, as we have seen, entirely unaffected. The procedure differs in no wise from the procedure in legislation. Decisions are given by vote, and should the vote of a layman be tendered it could not be refused. As a fact no such vote ever is tendered, and the judicial work is left severely to those members of the House who are confessedly competent to perform it. But it is not done exclusively by 'Lords of Appeal', and assistance in this part of its work is frequently rendered by distinguished lawyers who have held 'high judicial office'.

That the House of Lords does its work well as the Supreme Court of Appeal is acknowledged on all hands; that such work should fall to a body whose function is primarily legislative is one of the interesting anomalies of the English Constitution.

To that legislative function we may now pass. As one of the three branches of the legislature, the House of Lords, prior to the passing of the *Parliament Act* (1911), possessed in legal theory absolutely co-ordinate authority with the King and the House of Commons; subject to one important exception. In regard to the imposition of taxation, the powers of the House of Lords were limited, if not by statute, at least by convention and precedent, which in this country are not less binding than statutes. For the

[1] The Appellate Jurisdiction Act (1913), § 1, provided for the appointment of two additional Lords of Appeal in Ordinary.

rest the powers of the Lords as regards ordinary legislation were precisely parallel to those of the Commons. Any Bill, public or private, might originate in, and be amended or rejected by, either House indifferently. Before it could become an Act it had to obtain the concurrence of the other House and of the Crown. 'Be it enacted'—so runs the historic legislative formula—'by the King's most excellent majesty, by and with the advice and consent of the lords, spiritual and temporal, and commons in this present parliament assembled, and by the authority of the same.' Each House still has power to regulate its own procedure, and Bills affecting the privileges or proceedings of either House must originate in the House concerned. On a similar principle, Bills for the restitution of Honours originate as a rule in the House of Lords.

While, however, the theory is as stated above, the practice even prior to 1911 was widely different. In Private Bill legislation the position of the House of Lords is strictly co-ordinate with that of the Commons. Indeed, an acute American critic of English institutions has said with truth, that 'by far the most important officer of Parliament' in respect of Private Bill legislation is 'the Chairman of Committees in the House of Lords'. And he supplies the obvious reason: 'Being less busy with public affairs than the House Chairman, he is able to devote much more time to private bill legislation. He examines all the bills, even reading those introduced into the House of Commons before the Speaker's Counsel sees them.'[1] Thus in regard to private bills the House of Lords may be said to enjoy a position of superiority. But in regard to them only. With increasing uniformity, Governments—of all parties—tend to introduce all their important measures in the House of Commons. Not infrequently, formal protests have been entered against the practice, but without any substantial result. Alike by those who (in opposition) laud and magnify the Upper House, and by those who (in power) declaim against its pretensions, the House of Com-

[1] Lowell, *Government of England*, i. 390.

mons is to an increasing degree indulged with a first view of the legislative proposals of the Executive.[1]

It is important to emphasize the point that they are the proposals of the Executive. To say, as is sometimes said, that the power of initiation is being monopolized by the House of Commons, is flagrantly misleading. That power is enjoyed neither by the House of Commons nor by the House of Lords. In both Houses 'private members' count for less and less every year in the domain of legislation—even perhaps in that of criticism. Virtually the initiative in legislation has passed almost exclusively into the hands of the body which is primarily executive and administrative—the Cabinet. The growing autocracy of the Cabinet in this respect has become a commonplace with all commentators upon the working of English parliamentary institutions. 'The House', says Sir Sidney Low in his penetrating study, 'is scarcely a legislating chamber; it is a machine for discussing the legislative projects of ministers, and only one among the various instruments by which political discussion is in these days carried on.'[2] Lord Hugh Cecil, speaking in the House of Commons, uttered the naked truth to its face:

'We often hear of the infringements of the rights of private members, and it cannot be denied that a transfer of political power from the House of Commons to the Cabinet is going on. . . . Why is it that nobody cares, outside these walls, about the rights of private members? Because there is a deep-seated feeling that the House is an institution which has ceased to have much authority or much repute, and that when a better institution, the Cabinet, encroaches upon the rights of a worse one it is a matter of small concern to the country.'[3]

It is only fair to recall the fact that when Lord Hugh Cecil uttered these words the Cabinet was composed of his

[1] This loss of initiative is comparatively recent. During the administrations both of Mr. Gladstone and Mr. Disraeli many important measures were introduced in the House of Lords—a fact which may be ascribed perhaps to the presence of such Chancellors as Lord Selborne and Lord Cairns.

[2] *Governance of England*, pp. 75–6. [3] Quoted by Low, *op. cit.*, p. 79.

political friends: even so, it is difficult not to believe that he was guilty of some exaggeration. But the view of Mr. Lowell—an exceptionally sane and shrewd observer—is substantially the same, and he supports his conclusion by a series of very remarkable statistics showing the diminishing frequency with which amendments to Government Bills have been carried against the Government during the last half-century. Between 1851 and 1860 forty-seven such amendments were carried; between 1874 and 1878 not one; between 1894 and 1903 only two.[1]

Thus the House of Lords is not alone in its eclipse. Its diminishing importance in the sphere of legislation finds a parallel in that of the Commons, and both may be regarded as symptoms of a common cause—the increasing autocracy of the Cabinet, the encroachment of the Executive upon the sphere of the Legislature.[2] Whether this development is healthy or the reverse, whether it is a matter which the public may regard with the serene indifference of Lord Hugh Cecil, is not a point with which I am immediately concerned. My purpose is to show that while it is true that the Second Chamber has lost all effective power of legislative initiation, it has surrendered it not to the Commons but to the Cabinet. The only advantage enjoyed by the Commons over the Lords is that of a first taste of the legislative dishes served up by the ministerial chefs.

In one important domain the House of Lords had long occupied an admittedly inferior position. It had relatively little control over money bills. The modern theory is admirably stated by Sir Erskine May: 'The Crown demands money, the Commons grant it and the Lords assent to the grant; but the Commons do not vote money unless it be required by the Crown; nor impose or augment taxes, unless they be necessary for meeting the supplies which they have voted or are about to vote, and for supplying general

[1] Cf. *Government of England*, vol. i, c. xvii, *passim*. The above figures do not include divisions on the Estimates.

[2] Cf. Ilbert, *Legislative Methods and Forms*, p. 215 et seq.

deficiencies in the revenue.'[1] But this theory, however firmly established it now is, has been only evolved gradually.

In this connexion we may repeat the reminder that the English Parliamentary system was historically based upon the theory of 'Estates';[2] that the essence of an 'Estate' is separate taxation, and that, as a matter of fact, the three 'Estates' in England—the Baronage, the Clergy, and the Commons—were, in the beginnings of parliamentary history, absolutely independent of each other in respect of supplies voted to the Crown. That there was at one time a danger of the multiplication of these 'Estates'—a possible 'Estate' of the merchants, another of the lawyers—is a point which, though significant, need not detain us. The financial independence of the three regular 'Estates' is, however, a point of more than antiquarian significance. The Hundred Years' War with France affected the doctrine of Parliamentary taxation in two ways: on the one hand, the King being no longer able 'to live of his own' was compelled to have more frequent recourse to Parliament for supplies; while, on the other hand, the proved inefficiency of the feudal levy compelled the engagement of professional soldiers and reduced the military value and importance of the Baronial 'Estate'. Thus by the end of the fourteenth century things were tending in the direction of the modern practice. The Estate of the Clergy having refused to come into the system of national representation, continued to make their separate grants to the King in the two Convocations of Canterbury and York. As the fiscal system was developed it became usual for the clergy to follow the example of Parliament, but the separatist theory of an independent clerical Estate was jealously maintained. 'Of this liberty of Convocation,' says Bishop Stubbs, 'the kings were carefully observant; and the parliaments not less so.'[3] On one occasion (in 1449), as the same writer reminds us, the Commons in making their grant so far presumed as to take into account the gift of the clergy. They

[1] May, *Parliamentary Practice*, p. 604.

[2] But see *supra*, p. 5, note 2.

[3] *Constitutional History*, iii. 340.

were at once sharply reminded by the King that it was not for them but for the Convocations to decide that the tax should be voted. Thus the privilege of the Clerical Estate survived even the legislation of Henry VIII and remained intact until the Restoration.

It was otherwise with the Baronial Estate. By degrees, despite the fact that the Barons were still liable for personal military service, the Estates of Barons and Commons began to combine in grants of 'tenths and fifteenths', of tonnage and poundage, and other imposts. More than this. A formula comes into common use which gives a pre-eminence to the Commons. Grants begin to be made 'by the Commons with the advice and assent of the lords spiritual and temporal.' Since the close of the fourteenth century there has been no deviation from this formula.

The Parliament of Gloucester (1407) marks a further stage in the growing power of the Commons over taxation. It is common to assert that the recognition of the right of the Commons to initiate money Bills dates from an incident which occurred during this famous Parliament. Personally I am doubtful whether the vast superstructure of privilege based upon the proceedings of this session can be justified by an impartial examination of the facts. But the Commons undeniably were 'greatly disturbed' by the action of the Lords in fixing the amount of grant to the King, 'saying and affirming that this was in great prejudice and derogation of their liberties'; and Henry IV, apparently with the assent of the Lords, yielded the point and agreed that 'neither house should make any report to the King on a grant made by the Commons and assented to by the Lords, or on any negotiations touching such grant, until the two houses had agreed; and that then the report should be made by the mouth of the Speaker of the Commons'.[1] Whether this was, as is generally assumed, tantamount to a claim, on the part of the Commons, to initiate all money grants, there is, I think, reason to doubt; but it is not open to question that from this moment the theory of

[1] *Rot. Parl.* iii. 611, quoted by Stubbs, *C.H.* iii. 61.

'Estates' rapidly faded, and the financial pre-eminence of the Lower House became more and more marked.

Everything was favourable to the extension of parliamentary privilege in the first half of the fifteenth century. The Lancastrians occupied the throne by a parliamentary title, and attempted the experiment of making Parliament the direct instrument of government. The experiment proved to be premature; a healthy reaction ensued, and nearly two hundred years elapsed before similar pretensions were urged again. The period between the accession of the Tudors in 1485 and the overthrow of the Stuart monarchy in 1649, though supremely significant in regard to Constitutional development as a whole, is not marked by any contests of importance between the two Houses. Strife begins with the Restoration of 1660.

That Restoration was something more than a restoration of the Monarchy; it was a restoration of Parliament. For ten or twelve years Parliament had been crushed under the heel of a military dictatorship. Disguise it how we may, the fact remains that the rule of Cromwell was the rule of the sword and not of the robe. But in 1660 the Commons, like the Merry Monarch, came to their own again, still inflated with their recent triumph over the Crown and the Lords, and forgetful of the means by which it had been won. This was the real period of financial consolidation, the real beginning of the modern system of taxation. New financial expedients, by whomsoever devised, are not lightly abandoned. The Unionist party, despite ample opportunity, has never found it convenient to dispense with Sir William Harcourt's death duties; and the statesmen of the Restoration were not above adopting the financial methods of the Long Parliament. Two episodes of the Restoration are, in the present connexion, of marked significance. The clerical 'Estate' finally disappears. It is eminently characteristic of the development of English institutions that this interesting and important result should have been attained by a verbal and informal understanding between Archbishop Sheldon and the Chancellor

Clarendon. Since 1664 the Convocations have ceased to make separate grants to the Crown, and the clergy have been taxed like everybody else by Parliament. With the last remnant of clerical privilege disappeared also the last relics of feudalism. Feudal tenure by military service had been abolished by the Protectorate Parliament of 1656; it momentarily revived at the Restoration, but was finally swept away by statute in 1661. Thus 'Barons' and 'Clergy' at last fall completely into the national system; the old theory of 'Estates' has gone. Henceforward there is no distinction between classes, whether of privilege or of obligation: all are equal before the law.

This is the moment chosen by the Commons, and not unnaturally chosen, for the reassertion of their claims to exclusive, or at least pre-eminent control over taxation. The whole burden of maintaining the national services, in peace and war, now fell—apart from the 'hereditary' revenues of the Crown—as a common charge upon the nation at large. It was natural that the Commons should regard with jealousy and suspicion any attempt to tax the electors whom they represented. A pretext for a quarrel soon arose. In 1661 the Lords passed and sent down to the Commons a Bill for 'paving, repairing, and cleansing the streets and highways of Westminster'. The Commons in high dudgeon rejected the Bill, on the ground that 'it went to lay a charge upon the people', and 'that no Bill ought to begin in the Lords' House which lays any charge or tax upon any of the Commons'. To this assertion the Lords demurred, as being 'against the inherent Privileges of the House of Peers, as by several Precedents wherein Bills have begun in the Lords' House, *videlicet* 5^to^ Elizabethae, a Bill for the Poor, and 31 Eliz. for Repair of Dover Haven, and divers other Acts, does appear'. The Commons thereupon passed a Bill of their own, and sent it up to the Lords. This time it was for the Lords to protest: but in the event,

'The Lords, out of their tender and dutiful Respects to His Majesty, who is much incommodated by the Neglect of those

Highways and Sewers mentioned in the Bill, have for this Time in that respect alone, given Way to the Bill now in Agitation, which came from the House of Commons, with a Proviso of their Lordships; *videlicet*, "Provided always that nothing in the passing of this Bill, nor any thing therein contained, shall extend to the Prejudice of the Privileges of both or either of the Houses of Parliament, or any of them; but that all the Privileges of the said Houses, or either of them, shall be and remain, and be construed to be and remain, as they were before the passing of this Act, any thing therein contained to the contrary notwithstanding; with this Protestation that this Act shall not be drawn into Example to their Prejudice for the future."'[1]

The Commons refused to accept the Bill with this proviso; matters came to a deadlock, and the proposed legislation had to be abandoned.

A similar Bill of a more general nature was, however, passed in the following year; a similar impasse was threatened, but on this occasion the Lords, after formal protest from several of their members, gave way.[2]

But this was only the beginning. In 1671, and again in 1678, the Lords attempted to amend Bills of Supply sent up to them by the House of Commons, proceedings which evoked the two famous resolutions which are the *loci classici* of the constitutional lawyers. By that of 1671 the Commons affirmed that 'in all aids given to the King by the Commons, the rate or tax ought not to be altered by the Lords'.[3] That of 1678 asserted,

'That all aids and supplies, and aids to His Majesty in Parliament are the sole gift of the Commons; and that all Bills for the granting of any such aids or supplies ought to begin with the Commons; and that it is the undoubted and sole right of the Commons to direct, limit, and appoint, in such Bills, the ends, purposes, considerations, conditions, limitations, and qualifications of such Grants which ought not to be changed or altered by the House of Lords.'[4]

[1] *L.J.* xi. 328*a*.
[2] *L.J.* xi. 467–9.
[3] *C.J.* ix. 235.
[4] Cp. *C.J.* ix. 509.

The importance of these resolutions of 1671 and 1678, particularly of the latter, can scarcely in the present connexion be exaggerated, for as Mr. Pike, the erudite historian of the House of Lords, has justly observed:

'The proceedings of later times were long regulated, in the main, by this most important resolution of the year 1678. There have been instances in which the privilege claimed by the Commons, in this respect, have not been pressed to their full extent, and in which expedients have been devised for adopting reasonable suggestions made by the Lords, but the general principle in relation to measures of importance has never been abandoned.'[1]

Alike in 1671 and in 1678 the Lords in the end gave way, but not without the following emphatic protest:

'Resolved, *Nemine contradicente*, that the Power exercised by the House of Peers, in making the Amendments and Abatements in the Bill, instituted, "An Act for an additional Imposition on several Foreign Commodities, and for the Encouragement of several Commodities and Manufactures of this Kingdom," both as to the Matter, Measure, and Time, concerning the Rates and Impositions on Merchandize, is a fundamental, inherent, and undoubted right of the House of Peers, from which they cannot depart.'[2]

What then was the general principle affirmed in these historic resolutions? It will be observed that the Lords' right of concurrence in taxation was not questioned; but, under the resolutions, they could not legally *impose* a charge upon the people; hence they could not 'alter or amend' a tax proposed by the Commons, though they might refuse to concur in its imposition, and, therefore, might reject it. In course of time, however, and partly, perhaps, in consequence of the ambiguity of the wording of the resolution of 3 July 1678 confusion arose between a tax or grant, and the aggregation of taxes contained in a modern Finance Bill, and it became common to contend that the Lords had lost (if they ever possessed) the right to

[1] L.O. Pike, *Constitutional History of the House of Lords*, 344.
[2] *L.J.* xii. 498 b.

amend not only a particular tax, but the general scheme of taxation as embodied in a money Bill.

This confusion, and the difficulties arising therefrom, were unquestionably greatly enhanced by the ingenious though somewhat vindictive device invented by Mr. Gladstone in 1861. The circumstances are worth recalling, with some precision. In 1860 a Bill for repealing the duty on paper formed part of the financial proposals of the year. The anticipated loss of revenue from this and other duties was to be met by an increase in the income tax, from ninepence to tenpence in the pound. The Income Tax Bill passed both Houses; the Paper Duty Repeal Bill, after narrowly escaping defeat in the Commons, was rejected by the Lords. To no one did this action of the Lords give greater satisfaction than to Lord Palmerston, then Prime Minister. He had already expressed his private opinion to the Sovereign, that if the Lords rejected the Bill they would 'perform a good public service', and that 'the Government might well submit to so welcome a defeat'. But the Premier reckoned without his Chancellor of the Exchequer. Mr. Gladstone took a high line in regard to the action of the Lords, and Lord Palmerston was compelled, with very ill grace, to submit to the House of Commons a series of resolutions, reasserting in the strongest terms the privileges of the Commons in regard to taxation. The first affirmed that 'the right of granting aids and supplies to the Crown is in the Commons alone, as an essential part of their constitution, and the limitation of all such grants as to matter, manner, measure, and time is only in them'. The second, while admitting that the Lords had sometimes 'exercised the power of rejecting Bills relating to taxation by negativing the whole', nevertheless affirmed that the exercise of that power 'hath not been frequent, and is justly regarded by this House with peculiar jealousy as affecting the right of the Commons alone to grant supplies, and to provide the ways and means for the service of the year'. The third, grimly foreshadowing future action, stated 'that to guard for the future against an undue exer-

cise of that power by the Lords, and to secure to the Commons their rightful control over taxation and supply, this House has, in its own hands, the power so to impose and remit taxes, and to frame Bills of Supply that the right of the Commons as to the matter, manner, measure, and time may be maintained inviolate'. In regard to the rejected Bill itself, one further point demands notice: the Lords had already concurred with the Commons in providing the necessary supplies for the year. By rejecting the Paper Duty Repeal Bill they did, in effect, impose a charge upon the people which the Commons had declared to be uncalled for. The late Duke of Argyll addressed himself in a temperate and closely reasoned speech particularly to this point.[1] He said:

'I am not going to deny the legal power or right of this House to refuse any Bill which may be sent up for your assent. . . . I fully admit that there is no technical difference between rejecting a Bill imposing a tax and a Bill repealing a tax.'

'But every noble Lord must feel that it does make a very serious substantial difference in respect to an unusual exercise of power whether it be exercised in relief or in the imposition of a burden on the people. The very gist of my objection to such a course is that the danger of it does not lie on technical grounds; it lies on substantial grounds. In opposing the repeal of this duty you are going to the very heart and root of the constitutional powers of the other House of Parliament. You are not invading their technical privileges; you are not transgressing your own technical privileges; but in truth and in substance you are striking at the very root of the constitutional usage which has hitherto regulated the relations between the two Houses.'

The soundness of the Duke's argument is hardly to be disputed, and it is plain that if the Lords seriously meant war with the Commons on the question of the control of taxation, they were not particularly happy in their choice of a battle-ground. But, on the other hand, this much may be said: the rejected Bill was very unpopular in the House

[1] *The Duke of Argyll's Autobiography and Memoirs*, vol. ii, p. 160.

of Commons; it had passed by the narrow majority of nine; while, as to the country at large, not all the efforts of Gladstone and Bright could stir it to an interest in the subject, or to even the simulation of indignation against the 'unconstitutional' action of the House of Lords.

In the following session Mr. Gladstone's turn came. The veiled threat was translated into action. The Chancellor of the Exchequer not only showed his teeth, but proceeded to bite. He embodied all the financial proposals of the year, including the rejected Paper Duty Repeal Bill, in a single Bill, and challenged the House of Lords to accept or reject it as a whole. It was a bold challenge. But it was justified by success, and has set a precedent from which there has been no departure from that day to this. Mr. Gladstone's distinguished biographer does not exaggerate its significance when he writes:

'The abiding feature of constitutional interest in the budget of 1861 was this inclusion of the various financial proposals in a single Bill, so that the Lords must either accept the whole of them, or try the impossible performance of rejecting the whole of them. This was the affirmation in practical shape of the resolution of the House of Commons in the previous year. . . . Until now the practice had been to make the different taxes the subject of as many Bills, thus placing it in the power of the Lords to reject a given tax Bill without throwing the financial machinery wholly out of gear. By including all the taxes in a single Finance Bill the power of the Lords to override the other House was effectually arrested.'[1]

The ingenuity of Mr. Gladstone's device is not disputable. His opponents in the House of Lords had given him an opening, and he was not the man to neglect the opportunity for an effective 'retort'. And retort he did. But was it not at the expense of a serious derangement of the fine equipoise of our delicately-balanced Constitution? The Lords, after all, had at that time a legal right, denied by none, to concur in taxation. This right was deliberately

[1] Morley, *Life of Gladstone*, ii. 40.

abrogated, as far as the action of one branch of the Legislature can abrogate the powers of another, by the tactics of the Chancellor of the Exchequer. That was his intention; and that he claimed as his achievement. 'The House of Lords for its misconduct was deservedly extinguished in effect as to all matters of finance.'

For the moment the House of Lords bent before a very moderate storm. Whether wisely or unwisely, from the point of view of the immediate situation, it is difficult for the critic of a later generation to say. In the light of subsequent events one is tempted to believe that the opportunity of effective protest against a momentous (though not unprecedented) innovation was unfortunately neglected. The Lords were on weak ground in 1860 when they resisted; they might have taken up a position of advantage in 1861, when they were induced to acquiesce. Lord Derby's opinion seems to have been that the immediate point was not worth fighting about, and he contented himself with a formal reservation of rights for the future.

'We have it in our power,' he said, 'to divide the Bill which has been sent up to us by that House; and, so divided we have it in our power to adopt it, and to send it back to the Commons for acceptance or rejection. By that course we always have a remedy in our hands by which we can vindicate our privileges when we so please, and should circumstances ever arise so extreme as to justify that course, I hope your Lordships would not be slow to vindicate your rights. But I think it would be an act of power that would undoubtedly be extreme on the present occasion.'

Subsequent leaders of that House showed even greater caution than Lord Derby in touching questions of finance. Not perhaps since the Reform Act of 1832, certainly not since the death of the Duke of Wellington in 1852, has any statesman wielded a greater influence over the House of Lords than the late Lord Salisbury. And no statesman was ever more jealous of its honour, or more generally tenacious of its privileges. But in a speech delivered in the debates on Sir William Harcourt's Finance Bill of 1894, Lord

Salisbury warned the Peers of the constitutional inconveniences, not to say anomalies, which must arise from the exercise of their undoubted rights in regard to Finance Bills. 'You cannot,' he in effect argued, 'reject a money Bill because you cannot change the Executive; to leave the existing Executive in power and yet to deprive them of the means of carrying on the government of the country would create a grave constitutional situation.'

There is another incident in the relations of the two Houses in regard to finance to which reference must be made. The provisions contained both in the Australian Commonwealth Act and in the South Africa Act of 1909[1] gave to the question of 'tacking' an importance more than historical, and it is therefore worth while to recall the circumstances under which that device was first employed. Flushed by a succession of victories over the Lords between 1660 and 1689, the Commons in 1692, and again in 1700, determined to go a step further and complete the legislative discomfiture of the Upper House by combining in one measure an ordinary Bill and a Bill of Supply. Such tactics were naturally resented by the Peers, whose case is admirably put in a notable passage by Macaulay:

'Not only are we to be deprived of that co-ordinate legislative power to which we are, by the constitution of the realm, entitled. We are not to be allowed even a suspensive veto. We are not to dare to remonstrate, to suggest an amendment, to offer a reason, to ask for an explanation. Whenever the other House has passed a Bill to which it is known that we have strong objections, that Bill is to be tacked to a Bill of Supply. If we alter it, we are told that we are attacking the most sacred privilege of the representatives of the people, and that we must either take the whole or reject the whole. If we reject the whole, public credit is shaken; the Royal Exchange is in confusion; the Bank stops payment; the army is disbanded; the fleet is in mutiny; the island is left, without one regiment, without one frigate, at the mercy of every enemy. The danger of throwing out a Bill of Supply is doubtless great. Yet it may on the whole be better that we should face that danger, once

[1] See *infra*, pp. 120, 132.

for all, than that we should consent to be what we are fast becoming, a body of no more importance than the Convocation.'[1]

Some hotheads in the Commons even went so far as to threaten to use the newly-invented instrument for penal proceedings against political opponents: 'They object to tacking, do they? Let them take care that they do not provoke us to tack in earnest. How would they like to have Bills of Supply with Bills of Attainder tacked to them.' Macaulay justly describes this an 'atrocious threat, worthy of the tribune of the French Convention in the worst days of the Jacobin tyranny'.[2] The overbearing insolence of the Lower House was becoming insupportable. Even the calm and judicial Hallam describes 'tacking' as a 'most reprehensible device', as tending 'to subvert the Constitution and annihilate the rights of a coequal House of Parliament'.[3] Macaulay is characteristically more emphatic:

'In truth the House [of Commons] was fast contracting the vices of a despot. It was proud of its antipathy to courtiers; and it was calling into existence a new set of courtiers who would flatter all its weaknesses, who would prophesy to it smooth things, and who would assuredly be, in no respect less greedy, less faithless, or less abject than the sycophants who bow in the antechamber of kings.'[4]

It was indeed time that a determined stand should be made, in the interests of the nation at large, by the Chamber which was not technically 'representative'.

But here the Lords were confronted by a difficulty which has perpetually recurred. The particular occasion was not a favourable one. The 'tacked' Bill was one which intrinsically commended itself to the judgement of many of the Peers, and represented a cause likely to be popular—on broad grounds of expediency—in the country. Entirely objectionable as was the method adopted by the Commons, the Peers judged, and rightly, that the ground

[1] *History of England*, iv. 328–9.
[2] *Op. cit.* iv. 330.
[3] *Constitutional History*, iii. 142.
[4] *Op. cit.* iv. 326.

selected for a battle royal with the Commons must be in every respect favourable. 'The Lords', as Macaulay wisely observed, 'must wait for some occasion on which their privileges would be bound up with the privileges of all Englishmen, for some occasion on which the constituent bodies would, if an appeal were made to them, disavow the acts of the representative body; and this was not such an occasion.'[1] Unsteady and captious as is his judgement on men, in his judgements on political issues Macaulay is rarely at fault. The wisest of the Peers were in favour of surrender. The tacked Bill was accepted, but two years later (9 December 1702) the Lords placed it formally on record: 'That the annexing any clause or clauses to a Bill of aid or supply the matter of which is foreign to and different from the said Bill of aid or supply, is unparliamentary and tends to destruction of the constitution of the Government.'

So much for the position of the House of Lords in regard to judicature, to finance, and to general legislation.

Apart from these more formal functions of the Second Chamber there remains to be considered a third—of considerable importance. Bagehot said that the best way to cure a man of admiration for the House of Lords was to induce him to go and look at it. He referred to its dreary and desolate aspect in the discharge of its ordinary business. But with equal fairness it might be retorted that the surest way to instil respect for the House of Lords is to observe it on the occasion of a 'full dress' debate.

It is true that a debate in the Lords lacks one element of interest never absent from a debate in the Commons; it cannot directly determine the fate of a Ministry. The House of Lords is not (in Seeley's phrase) a 'Government-making organ'. But, nevertheless, its debates possess a compensating attribute denied, as a rule, to those in the Lower Chamber: they are real; they affect votes. Party discipline in the Commons is so strict that the result can usually be calculated beforehand almost with certainty.

[1] iv. 331.

In the freer atmosphere of the Lords no such calculation is possible. In the Lords there are many men on whom party allegiance sits very lightly, and some who own none at all. The House provides, therefore, an admirable arena for the discussion of matters which though of grave national importance are not yet ripe for legislative or administrative treatment, and on which party opinion is still undefined. It is not less well adapted for the discussion of topics, such as national defence, Foreign, Indian and Colonial administration, and many social questions, which never ought to be regarded as within the domain of party politics. Thus the House of Lords, though claiming no right to displace the Executive, is in the true sense a deliberative and consultative assembly.

So much it has seemed necessary to say in regard to the legal and constitutional functions of the Second Chamber of the Imperial Legislature. A few words may be added as to the actual place of the Peerage and the House of Lords in our modern democratic polity.

Half a century ago Bagehot emphasized the importance of the Peerage 'in its dignified capacity'. The office of an order of nobility, he declared, is 'to impose on the common people—not necessarily to impose on them what is untrue, yet less what is hurtful; but still to impose on their quiescent imagination what would not otherwise be there'. He believed in it, moreover, as a balance to the power of wealth; he went, indeed, so far as to say that the existence of a Peerage 'prevents the rule of wealth—the religion of gold', to which the Anglo-Saxon is naturally prone. It saves us also from the 'idolatry of office'—common in most continental countries. As for the House of Lords in its corporate capacity, Bagehot insisted primarily on its 'revising and suspending' power: it consisted of 'temporary rejectors and palpable alterers'. As a 'bulwark against imminent revolution' he had little belief in it; but he valued it, nevertheless, as 'an index that revolution is unlikely'. Though the House of Lords could never dam the tide of revolution, it is of pre-eminent utility in dealing

with legislation of anything less than first-rate interest and importance. In matters where public opinion is not powerfully moved the House of Commons, and still more the Cabinet, is apt to exercise a predominating and in some cases a mischievous influence. Here the utility of the Lords is obvious; in such cases 'the retarding Chamber will impede minor instances of parliamentary tyranny'.

Finally, the House of Lords provides what has been happily termed a 'reservoir of Cabinet ministers'. Under the strain and stress of modern political life the executive business of the country could not be efficiently performed if all the principal ministers of State were compelled to be, as some are, in constant attendance in the House of Commons. Many years ago Mr. Gladstone affirmed that 'no man can efficiently discharge in conjunction, especially at a time of crisis, the duties of the Foreign Department and that attaching to the leadership of the Commons'.[1] Mr. Balfour went even further when he declared that 'this most laborious department can never be filled . . . by any man who both does his work in his office and also does his work in this House'.[1] If, then, the correspondence between Legislature and Executive on which we pride ourselves is to be maintained, it is obvious that it can be maintained only by assigning not a few of the most onerous administrative offices to statesmen who possess or are willing to accept a seat in the Second Chamber. The House of Lords, moreover, possesses in conspicuous degree two attributes unknown to the Commons—leisure and independence. 'Besides independence to revise judicially, and power to revise effectually, [it] has leisure to revise intellectually.'

How far has the lapse of two generations confirmed or weakened Bagehot's argument in favour of the House of Lords? Is it more or less necessary to the efficient working of the Constitution? Have its functions altered, or are they in the main constant?

It is not to be denied that Bagehot's remarks as to the social utility of the Peerage strike somewhat oddly on

[1] Both quoted by Low, *Governance of England*, 252.

the ear to-day. Its 'dignified capacity' has almost continuously waned while the social prestige of mere wealth has, to the infinite disadvantage of society, almost as conspicuously waxed. Nor would a writer of to-day dismiss the social attractions of 'office' quite so cavalierly as Bagehot. The growth of bureaucracy in England, the multiplication of offices, great and small, have combined with other causes to alter the perspective a good deal. People of all classes show themselves increasingly eager to secure the modest competence guaranteed by Government employment. University graduates crowd into the competitions for places in the Civil Service in preference to the larger but much less certain emoluments of Commerce or the Bar; the lower middle classes are similarly anxious to enter the ranks of the central or local administration.

But, apart from this, Bagehot's analysis of the political functions of the House of Lords is still remarkably accurate if not exhaustive.

In the domain of legislation the work of the Lords is still primarily that of amendment and revision. And, by general admission, this work is done with remarkable efficiency, particularly in the case of measures of secondary party importance. In regard to the half dozen Bills on which in every Parliament the public gaze is concentrated and on which the fate of ministries depends, the exercise of this particular function is more open to criticism. The gist of the criticism is that in these cases the activity of the Upper House is wholly capricious; that when Tory Governments are in office the Lords are dumb dogs; while under Liberal Ministries they are ravening wolves tearing and mutilating the products of Liberal legislative wisdom. The charge may be exaggerated, but there is enough truth in it to cause searchings of heart to those who believe that a real revising Chamber is essential to the efficient working of the parliamentary machine.

A Second Chamber must from the nature of the case tend to be more conservative, in the broader sense, than the First; it is, therefore, natural, and, indeed, inevitable,

that its revising functions should be more freely exercised when measures emanating from a Liberal Government are under discussion. But this fact, though it explains the criticism, does not wholly remove its sting. Under modern conditions of legislation, when a vast number of Bills are sent up from the House of Commons, with contradictory amendments only partially reconciled, and with many clauses imperfectly discussed or even closured 'by compartments', some competent revising body is absolutely essential, if the legislative output is intended to serve any purpose except the increase of litigation. Such work the House of Lords does undeniably well; but can it safely be entrusted with the more responsible functions which at present it performs effectively only when Liberal ministries are in power?

For the due performance of these functions certain attributes are essential. The revising body must be entirely unfettered and independent in judgement; it must be judicial in temper, and it must be representative of many and varied interests and aspects of the national life. Can these attributes be truly predicated of the existing House of Lords? President Lowell, a distinguished American publicist, says: 'The House of Lords, without ceasing to have an opinion of its own on other matters, has become for party purposes an instrument in the hands of the Tory leaders, who use it as a bishop or knight of their own colour on the chess-board of party politics.'[1] Such a judgement, emanating from a source conspicuous for detachment and impartiality, cannot safely be ignored. That the House has courage and independence will be generally acknowledged; but if it is lacking in judicial temper, if it is representative only of a single interest, or even of a group of interests closely allied; above all, if it has in truth become 'a tool of the Conservative Party', then the time has unquestionably arrived when the reform of the revising Chamber needs to be taken seriously in hand.

That this opinion is shared by the ablest and more

[1] *The Government of England*, i. 409.

representative members of the House itself I shall show in a later chapter.[1]

Meanwhile it is important to notice one supremely effective check upon the Conservative predilections of the House of Lords which no fair-minded critic will ignore. Ever since 1832 the House has always kept its finger upon the pulse of the nation. It has never rejected an important measure on which the mind of the electorate had been unmistakably and definitely expressed. Mr. Lowell, in order to illustrate his dictum that the Lords are a tool of the Tory Party, refers to their acceptance of the Trades Disputes Bill of 1906, and their rejection of the Plural Voting Bill in the same session. But the explanation is not, as Mr. Lowell supposes, that party interests were thereby served; but that the Lords believed that for the former measure the Ministry had received a mandate from the electorate, and that for the latter they had not. Whether they were right or wrong is not, for the moment, the point; that they acted on an intelligible principle is beyond dispute.

In regarding the House of Lords as an ineffective barrier to revolution, Bagehot was surely right. Hasty legislation they may retard—though since 1911 only temporarily; ill-considered legislation they may amend—unless the Bill be certified by the Speaker as a 'money' Bill; but the tide of revolution they cannot stem if the political sovereign is determined to achieve it.

But this, until 1911, they could do: they could make sure that the 'revolutionary' change was one which was really desired by the electorate, and was not being rushed through the House of Commons at the dictation of an ambitious Cabinet, or under the goad of party discipline. And this was beyond dispute the most important political function exercised by the House of Lords. Like the Second Chambers in the two most recent and most democratic constitutions of the English-speaking world, those of United South Africa and the Australian Commonwealth, they could

[1] *Infra*, c. xiii.

demand that before any given measure becomes law it should be submitted to the deliberate judgement of the electorate.

That it was apt to exercise this function effectually only when Liberal ministries were in office is a fact which cannot be disputed, and must be deplored. A really impartial Second Chamber, charged with the duty of putting in force a referendum, would probably have referred to the people the appeal of the Nonconformists against the Education Act of 1902, just as they referred the appeal of the liquor trade in 1908, and that of the anti-socialists in 1909.

That something might be done by reform to secure a Second Chamber better fitted to fulfil this supremely important and responsible function I shall attempt in a later chapter to show. For the moment I am concerned only to contend that no constitution which claims to be democratic can afford to dispense with some safeguard of this kind. More especially must this be the case where the constitution itself is largely conventional, where written guarantees are conspicuous by their absence, and, above all, where the line of demarcation between the spheres of the legislature and the executive has been increasingly blurred.

The British electorate is exceptionally defenceless against the encroachment of an autocratic Executive, or a self-satisfied House of Commons. We have the experiences, related in the last chapter, to show to what length of usurpation an omnipotent legislature is apt to go when relieved of all immediate responsibility to Crown or People. We have the standing example of the Septennial Act of 1716, under which the duration of Parliament, elected for three years, was prolonged to seven—not to mention the more recent example of the Parliament of 1910—to prove that Parliament is legally sovereign and independent of the electorate. To confer this sovereignty upon a single Chamber, still more upon an executive committee of the Legislature, would be to flout the warnings of philosophy, and to ignore the teachings of experience. In every written

constitution which the advanced nations of the modern world have produced, some precaution is taken for securing that at least an appeal shall lie from Philip drunk to Philip sober. There is no longer any such safeguard in

[1] *Note to c. iv.* This chapter, like the others, has been carefully revised, but only so far as to bring it into conformity with the facts as they now (1927) are. For the events which led to the passing of the Parliament Act (1911), its provisions, and its effect upon the balance of the Constitution, see *infra* c. xii

V. THE AMERICAN SENATE

'The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof for six years, and each Senator shall have one vote.'—Constitution of the U.S.A., § 3.

'This masterpiece of the Constitution-makers.'—BRYCE.

'The one thoroughly successful institution which has been established since the tide of modern democracy began to run is . . . the American Senate.'—SIR HENRY MAINE.

'There is reason to expect that this branch (of the Legislature) will usually be composed with peculiar care and judgement; that (the Senators) . . . will be less apt to be tainted by the spirit of faction, and more out of the reach of those occasional ill-humours or temporary prejudices and propensities which in smaller societies frequently contaminate the public deliberations, beget injustice and oppression towards a part of the community, and engender schemes which, though they gratify a momentary inclination or desire, terminate in general distress, dissatisfaction, and disgust.'—ALEXANDER HAMILTON, in the *Federalist*, No. 27.

THE American Senate is, with the exception of the English House of Lords, the most interesting Second Chamber in the world, and it has some claim to be regarded as the strongest and most efficient.

In the first place, it illustrates as well or better than any other institution in the United States the essentially evolutionary and conservative character of the American Federal Constitution. Lord Bryce, indeed, wrote of this 'masterpiece of the Constitution-makers' as having been the result of 'a happy accident', but with something less than his accustomed accuracy. The assertion seems to suggest the idea, not infrequently entertained by less well informed persons, that the American Constitution sprang Athene-like from the brains of a small group of exceptionally able and exceptionally prescient publicists. To this error even Mr. Gladstone was a party. 'As the British Constitution is', he said, 'the most subtle organism which has proceeded from progressive history, so the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man.' That is very far from a true version of the case. The American Constitu-

tion, though ultimately drafted by a given body of men at a given moment in the national history, was no less conspicuously than our own the resultant of a long evolutionary process. *Magna Carta* and the *Bill of Rights* were similarly drafted each at a given moment, but no one disputes the fact that there is hardly a clause in either document which does not represent a prolonged struggle for the acquisition of certain rights or liberties, and point to the *origines* of an institution in a far distant past. In America the struggle was less prolonged, and the past less distant; but it is a grotesque error to suppose that tradition was absent from the mind of those who 'made' the Constitution. There were the Charters granted to the several colonies by the English Crown; there were the Constitutions or *Frames* drawn up by the colonists themselves, either, as in the case of Pennsylvania, under permission granted by the Crown, or, as in that of Connecticut, without it; there were the revolutionary Constitutions of 1776, drafted by the Continental Congress of 1775; there were a large number of schemes, inchoate and unrealized, projected at intervals during the previous 150 years for the promotion of union among the several colonies; above all, there was the experience gained from success and failure in the working of charters and constitutions during more than a century of the embryo nation's history. Thus the American Constitution was neither a 'pudding made from a receipt' (to adopt Arthur Young's happy phrase), nor was it, as Maine suggested, 'a version of the British Constitution as it must have presented itself to an observer in the second half of the last (i.e. the eighteenth) century';[1] still less was it, as others have maintained, modelled upon that of the United Provinces. Here and there an institution may owe something to English or Dutch models; but the Constitution as a whole was and is *native*; it bears in every limb and every feature traces of its parentage; marks of the prolonged labour through which it came to birth.

And this is especially true of the particular institution

[1] *Popular Government*, p. 207.

with which I am here concerned—an institution which, alike in its original conception and its practical working, has won the admiration of the civilized world.

Section III of the American Constitution runs as follows: 'The Senate of the United States shall be composed of two Senators from each State, *chosen by the Legislature thereof*,[1] for six years, and each Senator shall have one vote.' It is further provided that one-third of the Senate shall retire every two years, and that no one shall be elected to it who (*a*) is under thirty years of age; (*b*) has not been a resident of the United States for nine years; and (*c*) is not resident in the State for which he is elected.

Two points arrest attention at once. The first is that the Senate is neither hereditary, nor nominated, nor directly elected. It represents not the peoples, but the legislatures of the constituent States of the Union. The distinction has in practice proved to be less important than the framers of the Constitution intended, and for this reason. The Senate has drawn to itself so much attention; it fills so large a space in the political life of the United States, that elections to the State legislatures are made largely, if not primarily, with a view to the election of Federal Senators. Thus it has come to be election by the people 'once removed'.[2]

[1] By an amendment (the XVIth) adopted in 1913 it was provided that the Senators should be directly elected, and for the words italicized above should now be substituted 'elected by the people thereof'; and there should be added the words, 'The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures.' The electors vote, however, not by districts, but by a general ticket over the whole State. The expense involved in this method is heavy and gives an advantage to wealthy men and 'to those who command the support of powerful newspapers' (Bryce, *Modern Democracies*, ii. 64). Lord Bryce cautiously adds: 'Whether popular election will fill the Senate with better men remains to be seen.' In fact, the change has been rather in form than substance and does not touch the root principle of equality of representation for all the States,—a principle which radically differentiates the Senate from the House of Representatives. For further discussion of the point see Marriott, *Mechanism of the Modern State*, i. 124 seq. and i. 413 seq.

[2] For reasons which will be obvious from note 1 I leave this paragraph as it stood before the XVIth amendment.

A second point is, the continuous existence of the Senate. The membership of the Senate is renewed from time to time, but its members neither come in nor go out all together. One-third of the Senate retires every two years; but two-thirds of its members are always old, and thus stability and continuity are secured. Senators change, the Senate is permanent.

The purpose which the Senate was intended to serve in the general scheme of the Constitution is thus clearly stated in the *Federalist*[1] by Alexander Hamilton himself:—

'Through the medium of the State legislatures, which are select bodies of men, and who are to appoint the members of the National Senate, there is reason to expect that this branch will usually be composed with peculiar care and judgement; that these circumstances promise greater knowledge and more comprehensive information in the national annals; and that on account of the extent of country from which will be drawn those to whose direction they will be committed they will be less apt to be tainted by the spirit of faction and more out of the reach of those occasional ill-humours or temporary prejudices and propensities which in smaller societies frequently contaminate the public deliberations, beget injustice and oppression towards a part of the community, and engender schemes which, though they gratify a momentary inclination or desire, terminate in general distress, dissatisfaction, and disgust.'

It is noticeable, however (as Sir Henry Maine has pointed out), that the mode of choosing the Senate which was ultimately adopted was not that which had commended itself to Hamilton and others, and which they had originally proposed. Hamilton would seem to have preferred indirect election by an electoral college elected on a high property qualification—on the same principle, in fact, as the election of President. His plan suggested that 'each Senator should be elected for a district, and that the number of Senators should be apportioned among the several states according to a rule roughly representing population'.

[1] No. 27.

Whether this plan would have worked equally well is far from certain; still less certain is it that it would have provided a permanent solution of the difficulties which confronted the framers of the Constitution. On every ground, therefore, it is fortunate that it was not adopted.

What was the source of the scheme which was finally embodied in the Constitution? Where are we to look for the *origines* of the American Senate? To this question many divergent answers have been given. Some point to the English House of Lords as the original. But apart from the bicameral form the American Congress and the English Parliament have practically nothing in common. Others find in the composition of the Senate the final and conclusive proof of the theory which traces the American Constitution to a Dutch original. And with this degree of plausibility: the States-General of the Netherlands, like the American Senate, was representative not of the people but of the States, and each State found in it, without regard to size or population, equal representation. Mr. S. G. Fisher, whose work[1] on the American Constitution is, I fancy, less known in this country than it deserves to be, scornfully repudiates both theories. According to him the Senate is derived from the scientific cultivation of a purely native germ. That germ is to be found in 'the Governor's Council of colonial times'. This institution was

'at first a mere advisory council of the Governor, afterwards a part of the legislature sitting with the assembly, then a second house of legislature sitting apart from the assembly as an upper house; sometimes appointed by the Governor, sometimes elected by the people, until it gradually became an elective body, with the idea that its members represented certain districts of land, usually the counties. It had developed thus far when the National Constitution was framed, and it was adopted in that instrument so as to equalize the states, and prevent the large ones from oppressing the smaller ones. This was accomplished by giving each state two Senators, so that large and small were alike. The language in the Constitution

[1] *The Evolution of the Constitution of the United States* (Philadelphia, 1897).

describing the functions of the Senate was framed principally by John Dickinson, who at that time represented Delaware—one of the smaller states—which had suffered in colonial times from too much control by Pennsylvania.'

The Senate, then, came into being primarily as the guardian of the rights of the smaller states, and it represents the centrifugal tendencies which were the main impediment to the formation of the Union. 'The concession of equal representation in the Senate', says Bryce, 'induced the small states to accept of representation according to population in the House of Representatives, and a series of compromises between the advocates of popular power as embodied in the President, led to the allotment of attributes and functions which have made the Senate what it is'. Behind the Senate, therefore, there is a great deal of history; and bearing in mind all that it stands for, it is not remarkable that of all the fundamental principles of the American Constitution the most rigid and unalterable should be that of equality of state representation in the Federal Senate. 'No state', so runs the Constitution, 'can be deprived of its equal suffrage in the Senate without its own consent'—a consent which would, of course, under no circumstances be given.

Consisting originally of twenty-six members, the Senate now consists of ninety-six. The English Upper House consists of more than 700 members; the Italian of under 400; the French Senate of 314; the Canadian of 96; the German Reichsrat of 66; the Australian of 36; the South African of 40. Relatively to the size and population of the Union the American Senate is one of the smallest Second Chambers in the world—a fact which may in some degree account for the efficiency with which it performs the functions entrusted to it by the Constitution.

Those functions are threefold: Legislative, Judicial, and Executive.

Its legislative authority is, except in regard to finance, co-ordinate with that of the House of Representatives, and is exercised with a freedom to which many Second Cham-

bers are strangers. Any Bill (except a Bill to raise revenue) may originate in either House, and owing to the fact that in America the Executive does not, as in England, dominate the legislature, the Senate takes its fair share in the initiation of legislation. Finance Bills must originate in the House of Representatives, but the Senate enjoys and exercises the same powers of amendment and rejection in regard to these as in regard to other Bills. In the event of a disagreement between the two Houses a conference committee, composed of members of both Houses, is appointed by the President of the Senate and the Speaker of the House. The report of this committee is generally accepted by both Houses. Not until the Bill is passed in identical form by the two Houses is it sent up for the approval of the President, who has the right to send it back to Congress. Should it again pass by a two-thirds vote in both Houses, the President's veto lapses and the Bill becomes law with or without his assent.

If, as sometimes happens, a Bill passes one House and the other House declines to deal with it during that session, it may start again in the following session where it left off, provided that it is in the same Congress. Should a new Congress have been elected in the interval the Bill must start on its legislative career afresh.[1]

The part taken by the Senate in legislation is by no means its most characteristic or distinctive work. The fathers of the Constitution intended that the Senate, like the English House of Lords, should perform important judicial functions; and, unlike the House of Lords, should also have a share in the Executive. By Article I, § 2, of the Constitution the sole power of impeachment is vested in the House of Representatives; by § 3 the sole power to try impeachments is vested in the Senate. When sitting for that purpose Senators are to be on oath or affirmation. When the President of the United States is on trial, the Chief Justice is required to preside in place of the ordinary presiding officer of the Senate, who being also Vice-Presi-

[1] A. L. Dawes, *How we are Governed.*

dent of the Republic is naturally supposed to have a direct interest in the conviction and consequent removal of the President. In the trial of other officers the Vice-President presides as usual. The judicial powers of the Senate are, from the nature of the case, infrequently exercised. One President of the United States, President Johnson, was impeached in 1868, and was acquitted. Impeachment is the only means by which a federal judge can be got rid of, and in certain instances it has proved to be a clumsy, and even a brutal weapon. Four federal judges have been impeached, of whom two were convicted. In one case the device was resorted to as the only means of getting rid of a judge who had become insane.

In addition to these cases, a Secretary of War and a Senator have also been impeached. But few as have been the cases in which recourse has been had to this particular method of proceeding provided by the Constitution, it could not, as Lord Bryce said, 'be dispensed with, and it is better that the Senate should try cases in which a political element is usually present, than that the impartiality of the Supreme Court should be exposed to the criticism it would have to bear did political questions come before it. Most Senators are or have been lawyers of eminence, so that as far as legal knowledge goes they are competent members of a court'.[1]

Of all the attributes of the American Senate the most distinctive is the fact that it shares with the President two important executive functions: (i) the right of 'confirming' the appointment of all persons nominated by the President to act as ambassadors and judges of the Supreme Court and other federal officers or ministers;[2] and (ii) the right to concur in the making of treaties. In each case two-thirds of the Senators present must concur.

How has the joint executive authority of Senate and President worked in practice?

As regards the appointment of Cabinet ministers it has become customary for the Senate to approve, as a matter

[1] *The American Commonwealth*, i. 207. [2] Constitution, Art. II. § ii.

of course, the nomination of the President, to whom such ministers are solely responsible. In the appointment of ambassadors, consuls, judges, heads of departments, and the chief military and naval officers, the concurrence of the Senate is less of a mere form. In regard to other federal officers there has been gradually established what is known as the 'Courtesy of the Senate', by which the nomination to a federal office in any particular state is left by common consent to the senators representing that state. This arrangement is obviously advantageous to the party wire-pullers, but it is one against which many of the stronger Presidents have from time to time chafed and protested bitterly, though without effect.

In the appointment of minor officials the Senate takes no part. The Constitution permits Congress to vest in the heads of departments, or in the Courts of Law, or in the President alone, the right of nominating to such offices, and this power has been exercised to relieve the President of a large amount of inferior and troublesome patronage. Thus an Act, known as the 'Pendleton Act', was passed in June, 1883, providing for the appointment 'by the President by and with the consent of the Senate of a Civil Service Commission, consisting of three persons, not more than two of whom shall be adherents of the same political party, under whose recommendation as representatives of the President, selections shall be made for the lower grades of the federal service upon the basis of competitive examination'. It is, in fact, an attempt to 'take the civil service out of politics'.[1] It is noticeable, however, that neither this Act, nor any similar Act, can be anything more than permissive; it cannot in any strict sense either bind the President or curtail the constitutional rights of the Senate. This could be done only by an amendment of the Constitution itself.

How has the Constitution worked in regard to the exercise of patronage? Few critics, either native or foreign, have a good word to say for it. Of the former Mr. Woodrow

[1] Woodrow Wilson, *The State*, § 1331.

Wilson is typical; and his opinion is expressed in no uncertain terms: 'The unfortunate, the demoralizing influences which have been allowed to determine executive appointments since President Jackson's time have affected appointments made subject to the Senate's confirmation hardly less than those made without its co-operation; senatorial scrutiny has not proved effectual for securing the proper constitution of the public service.'[1] Lord Bryce may fairly be taken to represent the more cautious and balanced opinion of foreign critics. 'It must be admitted that the participation of the Senate causes in practice less friction and delay than might have been expected from a dual control.' 'It may be doubted whether this executive function of the Senate is now a valuable part of the Constitution. It was designed to prevent the President from making himself a tyrant by filling the great offices with his accomplices or tools. That danger has passed away, if it ever existed; and Congress has other means of muzzling an ambitious chief magistrate. The more fully responsibility for appointments can be concentrated upon him, and the fewer the secret influences to which he is exposed, the better will his appointments be.'[2] In this temperate judgement most English students of American institutions will be ready to concur. In the discharge of its executive functions the Senate sits, debates, and votes *in camera*; and with all deference to Lord Bryce, who regards public discussion as 'the plan most conformable to a democratic government', I cannot think that his alternative would be preferable. It is true that secret sessions may tend to obscure the responsibility both of the President and of the Senate; that they may lead to a large amount of log-rolling, and not infrequently to positive corruption. Nevertheless, public discussion of the claims of rival candidates for the highest executive and judicial offices of the State would not encourage the best men to allow themselves to be nominated, or secure for the successful candidate the support and respect of the nation as a whole. Publicity and

[1] *The State*, p. 544. [2] *Op. cit.* i. 106.

secrecy alike have disadvantages; but in view of the fact that the responsibility for nomination rests with the President, and that the function of the Senate is limited to 'concurrence', I cannot doubt that the Senate has chosen the lesser of two evils in maintaining the confidential character of its Executive sessions.

A similar method of procedure obtains in regard to the confirmation or rejection of treaties with foreign States. The advantages and disadvantages resulting from the interposition of the Senate in this delicate function have been hotly canvassed. It is clearly repugnant to English views of propriety that diplomatic engagements should be submitted before completion to the rough and tumble of debate in either branch of the Legislature. But in defence of the rule which prevails in America there are several points to be urged. In the first place, the Senate was in its inception less a branch of the Legislature than an appendage to the Executive. Or rather it was both. It corresponded at least as closely to the English Privy Council as to the House of Lords. Consisting of only twenty-six members, it was intended by the fathers of the Constitution to act as 'a council, qualified by its moderate size and the experience of its members, to advise and check the President in the exercise of his powers of appointing to office and concluding treaties'.[1] That there is a latent danger in this duality can hardly be denied, and had America been Europe the danger probably would long since have become apparent. But it has so far been minimized by the way in which the President has kept himself, as a rule, closely and continuously in touch with the Senatorial Committee for Foreign Policy. The Chairman of the latter body is in effect a sort of 'Parliamentary Second Secretary for Foreign Affairs'. Nevertheless, it may be necessary to modify the following paragraph in subsequent editions of *The American Commonwealth*:

'European statesmen may ask what becomes under such a system of the boldness and promptitude so often needed to

[1] Hamilton, *Federalist*, ap. Bryce, i. 108.

effect a successful coup in Foreign Policy. . . . The answer is that America is not Europe. The problems which the Foreign Office of the United States has to deal with are far fewer and usually far simpler than those of the old world. The Republic keeps consistently to her own side of the Atlantic [though her power has now crossed the Pacific]: nor is it the least of the merits of the system of senatorial control that it has tended, by discouraging the Executive from schemes which may prove resultless, to diminish the taste for foreign enterprises, and to save the country from being entangled with alliances, protectorates, responsibilities of all sorts, beyond its own frontiers.'[1]

That there was great weight in this judgement is indisputable; but there is less of truth in it now than when it was written, nearly forty years ago (1888). The Spanish War, the annexation of the Philippines, and the extension —or perversion—of the Monroe doctrine have done much to drag the United States into the welter of world politics. But this tendency has been due less to their own advance or aggression than to the shrinkage of the world, a shrinkage which the Americans themselves have done not a little to bring about.

There is, I suggest, a third reason, even more conclusive, for the intervention of the Senate in the functions of the Executive. So long as the Americans cling to the theory of the rigid separation of powers, some such relaxation in practice is inevitable. The enormous and preponderating power of the Executive in England is possible only because the Executive is strictly responsible to the Parliamentary majority, and because ministers are conscious that any flagrant misuse of power, whether in domestic or in foreign affairs, would be followed by instant

[1] *Op. cit.* i. 103. The passage, with the addition of the words inserted in brackets remains unaltered in the second edition (1910) of *The American Commonwealth*, i. 107. In a note (ii. 80) in *Modern Democracies* Lord Bryce writes: 'As to the conduct of foreign affairs by the joint action of the President and the Senate, . . . the plan of the U.S. Constitution does not work smoothly.' He also adds (ii. 409) 'The Senate has frequently checked the President's action, sometimes with unfortunate results.' Cf. also Marriott, *Mechanism of the Modern State*, i, c. v.

dismissal at the hands of the Legislature. No such power resides in the Legislature of the United States. Should the President or his ministers be guilty of a legal offence, resort may be had to impeachment. But impeachment, as the Long Parliament discovered to its chagrin in the case of Strafford, is at best a clumsy weapon with which to attack a powerful minister. For the correction of errors, as apart from crime, it is wholly inappropriate. If, therefore, the Executive is, for a fixed term, virtually immovable, the immensely important task of concluding treaties with foreign States cannot be left to the unchecked and unlimited discretion of the President. If his responsibility is to be shared, there is no body with whom it can be shared with less inconvenience and impropriety than with the Senate.

That the Senate is no longer, owing to the inclusion of new States, the select body of councillors contemplated by the founders of the Commonwealth is true; but the difficulties arising from its inevitable and automatic enlargement have been, in great measure, obviated by the delegation of work to a series of standing committees: a committee on Finance to which all questions affecting the revenue are referred; a committee on Appropriations which advises the Senate concerning all votes for the spending of moneys; a committee on Foreign Affairs, on Railways, and so forth. This committee organization, according to Mr. Woodrow Wilson, 'may be said to be of the essence of the legislative action of the Senate', and has immense influence upon its action in all capacities.[1] Only indeed through these committees, and especially through the chairmen of committees, can the Senate keep that touch with the Executive which, denied by the theory of the Constitution, is nevertheless in practice essential to its successful working.

In conclusion, two questions may be asked and briefly answered: (i) How far has the federal Second Chamber of the United States answered the expectations and fulfilled

[1] *Op. cit.*, p. 529.

the intentions of the framers of the Constitution? and (ii) How does it compare with the more important Second Chambers of European States, notably with the English House of Lords and the German Reichsrat?

The Senate, as we have seen, was intended to be primarily the embodiment of the federal principle in the Constitution. It was hoped that it would 'conciliate the spirit of independence in the several States by giving each, however small, equal representation with every other, however large, in one branch of the national government.'[1] In the early days of the Republic this was a point of great importance; the union was ill-compacted and incoherent, and the part played by the Senate in cementing it was in no sense nominal or meagre. With the growth of time and the evolution of an American national spirit, this particular function has naturally become of less importance, but it is by no means obsolete or superfluous. As compared with the House of Representatives which represents the people, the Senate represents primarily the States.

Apart from this, its elementary function, the Senate performs that of an ordinary Second Chamber. It restrains 'the impetuosity and fickleness of the popular House, and so guards against the effect of gusts of passion or sudden changes of opinion in the people'. It does, moreover, in an eminent degree, fulfil the intention of its founders by providing 'a body of men whose greater experience, longer term of membership, and comparative independence of popular election' makes them 'an element of stability in the government of the nation, enabling it to maintain its character in the eyes of foreign States, and to preserve a continuity of policy at home and abroad'.[2] How admirably the Senate has attained, in this respect, its object is admitted by all who are competent to express an opinion.

The Senate is unquestionably a stronger Second Chamber than the English House of Lords. Not only has it larger powers and more extended functions, but it exercises those powers with greater freedom and independence, and in the

[1] Hamilton, *Federalist*. [2] Hamilton.

main with more general assent. And it is, therefore, worth while, in view of possible modifications in the structure or functions of the House of Lords, to scrutinize somewhat closely the reasons of its superiority. In the first place, the Senate, as Bryce points out, 'has drawn the best talent of the nation, so far as that talent flows to politics, into its body, has established an intellectual supremacy, has furnished a vantage ground from which men of ability may speak with authority to their fellow citizens'.[1]

'The Senate', says Mr. Woodrow Wilson, 'is just what the mode of its election and the conditions of public life in this country make it. Its members are chosen from the ranks of active politicians, in accordance with a law of natural selection to which the State Legislatures are commonly obedient; and it is probable that it contains, consequently, the best men that our system calls into politics. If these best men are not good, it is because our system of government fails to attract better men by its prizes, not because the country affords or could afford no finer material. The Senate is in fact, of course, nothing more than a part, though a considerable part, of the public service; and if the general conditions of that service be such as to starve statesmen and foster demagogues, the Senate itself will be full of the latter kind, simply because there are no others available. There cannot be a separate breed of public men reared specially for the Senate. It must be recruited from the lower branches of the representative system, of which it is only the topmost part. No stream can be purer than its sources. The Senate can have in it no better men than the best men of the House of Representatives; and if the House of Representatives attracts to itself only inferior talent, the Senate must put up with the same sort. Thus the Senate, though it may not be as good as could be wished, is as good as it can be under the circumstances. It contains the most perfect product of our politics, whatever that product may be.'[2]

More important than the House of Lords as regards its legal functions, the Senate is not inferior to it in popular 'intelligibility'. The House of Lords is of course con-

[1] *Op. cit.* i. 111.

[2] Wilson, *Congressional Government*, pp. 194–5.

spicuously fortunate in this respect. Its position rests on a principle which if no longer generally accepted is at least clearly intelligible. But the American Senate is at no disadvantage here. It also, as I have shown, is the result of a natural and native evolution, and it rests on a principle which is not less intelligible than hereditary succession. Further, it is a principle which differentiates it from the House of Representatives just as clearly as the principle of birth differentiates the hereditary House of Lords from the elected House of Commons. And to secure an intelligible differentia for a Second Chamber is, as publicists are never weary of insisting, a point of immense importance and immense difficulty in constitution-making. That difficulty has been a great stumbling-block in France, and hardly less so, as we shall see, in the case of our own colonial constitutions.[1]

The American Senate, moreover, is superior to the House of Lords in its efficiency as a revising chamber, and in the respect and confidence which it inspires. The latter advantage is due perhaps to the elective basis on which it rests, the former attribute is inseparably bound up with its restricted size. Hence the consensus of opinion among all reformers of the English House of Lords—among all at least who desire to increase and not to impair its efficiency and repute—that the first and essential step is to reduce its overgrown and unwieldy bulk to something like the dimensions of the American or at any rate of the French Senate.

I have suggested some points of comparison and analogy between the American Senate and the House of Lords. A closer analogy exists between the Senate and the German Reichsrat. That analogy will become apparent in the following chapter. Meanwhile, we may observe that the whole American Legislature is in some respects at a serious disadvantage as compared with the English Parliament. Many years ago Bagehot described the American Legislature as 'a debating society, adhering to an executive'. In

[1] *Infra*, chapters vii, viii, ix.

view of the share in executive authority assigned by the Constitution to the Senate, the expression is perhaps not strictly accurate. But Bagehot had in view the exclusion of members of the Executive from the Legislature, the absence of that 'correspondence' on which he rightly lays stress as one of the most characteristic features of the English Constitution. The fathers of the American Commonwealth did their work at a moment when the jealousy of 'placemen' was still an active force in English politics, when the English Crown still sought to influence the Legislature by the exercise of patronage, and when Montesquieu's doctrine of the separation of powers was still profoundly influential among the publicists of Western Europe. Under these circumstances it is not remarkable that the Americans, like successive constitution-makers in France, should have attempted to render the Legislature independent by excluding the members of the Executive. But by so doing they deprived Members of Congress, as Bryce pertinently points out, 'of some of the means which European legislators enjoy of learning how to administer, of learning even how to legislate in administrative topics. They condemned them to be "architects without science, critics without experience, and censors without responsibility"'.[1] Moreover, as the same acute critic insists, the attempt to keep legislature and executive rigidly distinct has had a result not foreseen by the makers of the Constitution. It has led the 'Legislature to interfere with ordinary administration more directly and frequently than European legislatures are wont to do. It interferes by legislation, because it is debarred from interfering by interpellation'.[2]

Finally, it must be remembered that the federal legislature of the United States is, in another important respect, on an altogether lower plane than our Imperial Parliament: it is merely legislative and not constituent; it can make laws, but only within the four corners of the Constitution; the Constitution itself it cannot touch. Upon

[1] *American Commonwealth*, i. 224. [2] *Ibid* i. 86.

the power of the British Legislature there is, of course, no such limitation. It is hardly open to question that the restricted area of legislative activity, combined with the fact that service in the Legislature does not, as in England, open an avenue to a place in the Executive, must in the long run affect the supply of really first-rate political talent.

Nevertheless, the American Senate holds a place among the Second Chambers of the world inferior to none. Its judicial functions are less important than those of the House of Lords; the executive functions which it shares with the President, though imposing, are not so continuous as those exercised by individual members of the English Peerage, but as a branch of the Legislature its position relatively to the House of Representatives is at once more dignified and more influential than that of our own Upper House. Consequently, in America, at any rate, the bicameral system is outside the region of political controversy. Whatever the faults of the Senate, it is, as Bryce says with unusual emphasis, 'indispensable'.[1]

[1] *Modern Democracies*, ii. 66.

VI. THE GERMAN REICHSRAT (BUNDESRAT) AND THE SWISS STÄNDERAT

'A Reichsrat is formed in order to represent the German States in the legislation and administration of the Reich. In the Reichsrat, each State has at least one vote. . . . In Committees appointed by the Reichsrat from its members no State shall have more than one vote. . . . The States are represented in the Reichsrat by members of their Government.'—Constitution of the German Reich (1919).

'The central and characteristic organ of the Empire is the *Bundesrath*, the Federal Council, which is, alike in make-up and function, the lineal successor of the Diet of the older Confederation.'—WOODROW WILSON.

BETWEEN the American Senate and the German Reichsrat there are many points of similarity, and not a few of contrast.

In Germany as in America the Second Chamber of the Legislature (if as such the Reichsrat may be provisionally regarded) constitutes, perhaps, the most characteristic feature of the federal constitution. An American critic, indeed, described the Federal Council as 'the central and characteristic organ of the Empire'. 'Standing for the federal idea in the Empire,' writes another American, 'it is the place of all places where the individual States may assert themselves, where the play of State interests is adjusted.' How far these judgements are justified it is the primary purpose of this chapter to consider.

Both institutions—the American Senate and the German Reichsrat developed from a common germ—a diet of ambassadors representing separate and virtually independent States. So much was this point emphasized that the non-Prussian members of the Bundesrat were accorded the privilege of extra-territoriality at the seat of the federal government.[1] Both retain to this day not a few marks of their origin. Both represent not the people but the component *States* of the federal union.

If, however, the similarities are striking, not less so are the points of difference. While the American Senators are

[1] Oppenheimer, *The German Constitution*, p. 108.

elected by the State electorates, the federal councillors in Germany are appointed by their respective *Executives*; they represent, indeed, not the people of the component States but the State Governments.[1] The Weimar Constitution (§ 63) lays it down that the States shall be represented in the Reichsrat by members of their respective governments. It was clearly contemplated that these representatives should be ministers, but the term has in practice been held to cover the permanent heads of the administrative departments. Again; while the root principle of the Senate is equality of State representation, that of the Reichsrat reflects the conspicuous inequality of the States which compose the German Empire. Particularly it reflects the immense preponderance of Prussia, which possesses twenty-seven times the representation of the smaller States. Further, while the two Senators representing, for example, Massachusetts or Virginia, may vote in a division on separate sides, all the delegates of a German State must vote 'solid'. Their vote is in fact a State vote, and it can be given by a single delegate and subsequently raised to the power of the State representation.[2]

[1] The first draft of the Weimar Constitution provided for the election of the Reichsrat by the State legislatures; but State particularism combined with ultra democracy to defeat their proposal.—Oppenheimer, *op. cit.* p. 109.

[2] The Prussian representatives in the Reichsrat are, as to one half, appointed by the Government (the *Staatsministerium*); but the other half are appointed by the Prussian Provinces (one by each). The Provincial delegates vote freely, as individuals. Those of the Government are *instructed* delegates and must vote solid. The statement in the text as to the solidity of the State votes in the Reichsrat remains substantially accurate; but some high authorities regard it as an open question. Dr. Oppenheimer, for example, points out that while the Constitution does not expressly apply to the Reichsrat the rule laid down for the Reichstag that members are subject to their conscience alone, yet it pointedly refrains from reproducing the provision of the Imperial Constitution that votes which are not 'instructed' are invalid. 'It was', he adds, 'felt to be the business of the States to decide whether or not to bind their representatives by instructions, and not for the Federation to interfere as between a State and its plenipotentiaries' (*op. cit.*, p. 120). It is, however, inconceivable, in view of the fact that the delegates are members of responsible Governments, that they should not vote in accordance with the policy of the State Government.

The Reichsrat consists of sixty-eight members, appointed by the States of the Reich. Of these members Prussia claims twenty-seven; Bavaria has eleven votes; Saxony, seven; Würtemberg, four; Baden, three; Hesse, Thuringia, and Hamburg, two apiece; and the other ten units, one apiece.

Under the Weimar Constitution the Reichsrat still represents the States (*lands*), as opposed to the people, both in legislation and administration. Each *land* has at least one vote and an additional vote for each million of population; but no land may have more than two-fifths of the total, nor have more than one vote on any committee of the Reichsrat.

The relation of the Reichsrat to the Executive is precisely defined. Ministers may claim to be heard in the Reichsrat and if summoned must attend the House or any Committee thereof. It is their constitutional duty to keep the Reichsrat officially informed as to Government policy, and to consult the appropriate committees of the Reichsrat on any question of importance.

The assent of the Reichsrat must be sought for Government Bills before they are introduced into the Reichstag; if the Reichsrat refuses assent the Bill may still be sent to the 'lower' Chamber, but the Government is bound to state officially its reasons for insistence. If the Reichsrat passes a Bill against the advice of the Government the latter must nevertheless introduce it into the Reichstag with a statement of its reasons for opposing the Bill. If the Reichsrat rejects a Bill passed by the Reichstag, and the Government still presses the Bill, the Reichsrat may, with the consent of the President, demand a *Referendum*. If the President refuses his consent to the latter course the Bill lapses. For the initiation of Constitutional amendments a two-thirds majority in both Houses is requisite; but the veto of the Reichsrat is now only suspensive instead of, as formerly, absolute. It is manifest, therefore, that the place of the Reichsrat under the Weimar Constitution, though far from insignificant, is markedly less important than it was under the Empire.

With this brief glance at the position of the German Reichsrat we may pass to the consideration of the only Second Chamber in Europe which can be at all profitably compared with it—the Ständerat of the Swiss Confederation.

The Council of States in Switzerland is differentiated from the National Council mainly, if not solely, by the fact that in the former the several Cantons enjoy equal representation. Consisting as it does of forty-four members, two from each of the twenty-two Cantons, it looks at first sight as though it were strictly analogous to the Senate of the United States, and, like the Senate and the Reichsrat, supplied the federal element in the central institutions of the country. Professor Woodrow Wilson denied, however, that the Swiss Ständerat possesses any 'such clearly defined character'. It is hazardous to express dissent—however slight—from Professor Woodrow Wilson on any point connected with the working of Federal Government, but I confess that the grounds on which he denied to the Swiss Ständerat a 'clearly defined Federal character', appear to me to be insufficient. It is true, of course, as he pointed out[1] that 'the mode in which its members shall be elected, the qualifications they shall possess, the length of time which they shall serve, the salary which they shall receive, and the relations they shall bear to those whom they represent, in brief, every element of their character as representatives, is left to the determination of the Cantons themselves'; and that 'the greatest variety of provisions consequently prevails'. But true as this is, and much as it may impair the analogy—in other respects—between the Swiss Ständerat and the American Senate, the fact remains that like the American Senate and the German Reichsrat, like the Second Chambers in the Canadian Dominion and the Australian Commonwealth, the Ständerat represents the Constituent *States* of the union rather than the *people*. This being so, I find it difficult to understand on what ground a *federal* character

[1] *The State*, p. 323.

can be denied to it. But in no other respect is it analogous either to the Reichsrat of Germany or to the American Senate. It has no special functions which differentiate it from the National Council. The initiation of legislative proposals belongs equally to the two Councils; it is, indeed, divided between them by the arrangement of their respective presidents at the commencement of each session. To neither House are the ministers responsible; in neither may they sit or vote; but in both they attend and speak when proposed legislation is under consideration, and in both they are required to answer interpellations addressed to them. In every respect the authority and functions of the two Houses are co-ordinate; and in the exercise of certain electoral and judicial functions they act as a single Assembly in joint session.

The following are among the more important of the matters which fall, according to the Constitution, within the competence of the federal legislature: (i) laws on the organization and election of federal authorities; (ii) laws and ordinances on matters which the Constitution puts within the federal competence; (iii) the creation of federal offices and the rates of remuneration for them; (iv) the election of the Federal Council, of the Federal Court, of the Chancellor, and the Commander-in-chief of the federal army; (v) foreign treaties and alliances, together with the approval of treaties concluded between Cantons, or between any Canton and a foreign power; (vi) measures for national security; the declaration of war and conclusion of peace; (vii) the guarantee of the Constitutions and territory of the Cantons; internal police, amnesty and pardon; (viii) the enforcement of the provisions of the Federal Constitution, and the fulfilment of federal obligations; (ix) the control of the federal army; (x) the annual budget; the audit of public accounts and the issue of federal loans; (xi) the supervision of the federal administration and judiciary; (xii) protests against the decisions of the Federal Council with reference to administrative conflicts; (xiii) conflicts of jurisdiction between federal

authorities; and (xiv) the revision of the Federal Constitution.[1]

In all such matters the concurrence of both Houses is essential; and on the demand of eight Cantons, or 30,000 voters, any federal law must be submitted to the people by *Referendum* for acceptance or rejection. A constitutional amendment *must* be submitted to the people, and must be approved, before it can become law, both by a majority of the people and by a majority of the Cantons.

But these are attributes of the legislature as a whole. The peculiarity of the Ständerat is that it is the only Second Chamber in Europe, perhaps in the world, the functions of which are in no way differentiated from those of the other Chamber of the Legislature.

Having thus considered the Second Chambers of the American Federal Republic, and of the two Federal Powers of Europe, I propose in the next chapters to examine the constitution and working of the Second Chamber of the Legislature in the British Dominions beyond the sea.

[1] Constitution of the Swiss Confederation (29 May, 1874), Arts. 84–94.

VII. SECOND CHAMBERS IN THE OVERSEA DOMINIONS.—CANADA

'The genius of Earl Grey not only devised for the greater colonies a system of government which reproduced as nearly as possible the external features of our own, but . . . breathed into the copy the inner essence of the original—the possibility of silent constitutional growth.'—SIR HENRY JENKYNS.

'There is perhaps no more difficult question in practical politics, or one towards the solution of which the political thinker can give less help, than that of forming in a new country an Upper House.'—PROFESSOR W. E. HEARN.

THE German Reichsrat and the Swiss Ständerat possess features of some interest to the student of political institutions. Of greater interest is the history of the evolution of the American Senate. But most interesting of all, to the English student, are the Second Chambers which, without exception, form part of the central Legislatures of the Oversea Dominions of the British Crown.

In attempting to analyse the nature and to describe the working of Colonial legislatures, the warning suggested by the words quoted above from the late Sir Henry Jenkyns's admirable work on *British Rule and Jurisdiction* must be carefully observed. Jurists have agreed to divide the Constitutions of the world into 'written' and 'unwritten', or again into 'rigid' and 'flexible'. The correspondence between the two categories is not, be it noted, invariable; and even in Constitutions which are, like that of the United States, both written and rigid, it would be unsafe to rely exclusively upon the written text. But if this be true of the United States, where the Constitution approaches nearer to complete inflexibility than any other in the modern world, it is still more conspicuously true of the constitutions of the great self-governing communities which still owe allegiance to the British Crown.

The Canadian Union Act of 1840 is an instance in point. That Act was the direct legislative outcome of Lord Durham's famous Report on Canada, published in 1839.[1]

[1] Reprinted by the Oxford University Press (1912), edited by Sir C. P. Lucas.

That Report with the resulting legislation is regarded, and rightly, as the Magna Carta of Colonial self-government. Lord Durham went out in 1838 with the avowed hope and intention that he might be 'the humble instrument of conferring upon the British North American Provinces such a free and liberal Constitution as shall place them on the same scale of independence as the rest of the possessions of Great Britain'. He more than fulfilled his intention His *Report* insisted that 'the Crown must consent to carry the Government on by means of those in whom the representative members have confidence'. And again: 'The responsibility to the United Legislature of all officers of the Government, except the Governor and his Secretary, should be secured by every means known to the British Constitution. The Governor . . . should be instructed that he must carry on his Government by heads of departments in whom the United Legislature shall repose confidence; and that he must look for no support from home in any contest with the Legislature except on points involving strictly Imperial interests.' Lord John Russell, on behalf of the Imperial Government, accepted in the fullest and frankest way the principle thus enunciated by Lord Durham. 'Your Excellency . . . must be aware that there is no surer way of earning the approbation of the Queen than by maintaining the harmony of the Executive with the legislative authorities.' Thus he wrote to the Governor-General of Canada (Lord Sydenham) in October, 1839. As to the intentions, therefore, both of the brilliant Pro-Consul and of the Government which he represented, there can be no question. But the remarkable point is that the principle so emphatically enunciated by Lord Durham and Lord John Russell finds no place in the Legislative Act of 1840. The Act merely referred to 'such executive Council . . . as may be appointed by Her Majesty' (§ 45). As to the mode of appointment it is silent. The fact is that here, as elsewhere, *lacunae* were to be supplied by reference to English practice and precedent. A knowledge of and deference to the principles of constitutional government as

understood in England is throughout presupposed. But it was not until the governorship of his son-in-law, Lord Elgin, that the practice became fully conformable to Durham's principles. In 1847 Lord Elgin was formally instructed 'to act generally on the advice of the Executive Council and to receive as members of that body those persons who might be pointed out to him as entitled to be so by their possessing the confidence of the Assembly', i. e. the Lower House of the Legislature.[1] More remarkable still is the fact that not even in the British North American Act of 1867 is there any explicit recognition of 'responsible Government'.

The warning suggested by the evolution of Canadian self-government is applicable in greater or less degree to the interpretation of all the written Constitutions of the Over-sea Dominions, and not least to those portions of them which concern the relations of the two branches of the Legislature.

In none of the great Dominions has there been any attempt to introduce the principle of a unicameral legislature. The provincial legislatures of Canada (and even here Quebec and Nova Scotia form exceptions) consist of one House only, as does the State Legislature of Queensland, but with these exceptions both the Federal and the State Legislatures are alike and uniformly bicameral. In the Federal Legislatures and in that of United South Africa the Second Chamber is known as a Senate; in the Unitary Constitutions as a Legislative Council.

In this and the following chapters an attempt will be made (i) to describe the working of the bicameral system in each of the great self-governing Colonies; (ii) to analyse the composition and powers, to note the mode of appointment, and to discuss the constitutional function of the Second Chambers; and (iii) to focus the results thus attained, and to draw from them some conclusions as to the value of the system as a whole.

[1] Quoted by Sir Henry Jenkyns, to whose work cited above reference should be made for further illustration of this point.

It is natural to begin with the Dominion of Canada, since Canada, in the matter of constitutional evolution, as in much else, has shown the way to the other Oversea Dominions.

From its acquisition by conquest in 1760 down to 1774, Canada was governed, and with admirable tact and success, under the *règne militaire*. The Quebec Act of 1774 established a Legislative Council of Crown nominees with certain restricted rights of legislation and of local and municipal taxation. A further stage was registered by the passing of Pitt's *Canada Constitutional Act* of 1791. The large influx of American loyalists after the recognition of Independence in 1783, reinforced by a considerable emigration from home, created a problem with which Pitt dealt promptly and wisely. Under one Governor and one Legislative Council there were now two Canadas: the one French in origin and Roman Catholic in religion; the other English and Protestant. Pitt recognized the fact; divided Canada into two Colonies, Upper and Lower, and gave to both Colonies representative institutions without a 'responsible' executive. In both Colonies there was to be a bicameral legislature: (i) a small Legislative Council consisting of persons nominated by the Crown for life, and (ii) an elected Legislative Assembly. The arrangement worked well for a time, but the difficulty of combining a representative local legislature with an autocratic executive responsible to Downing Street soon made itself manifest, and this, in addition to fiscal, ecclesiastical, and racial complications, led to the rebellion which came to a head in 1837. This rebellion roughly arrested the attention not only of the English Government, but of the English people, and the historic mission of Lord Durham was the result. On the advice of that brilliant but impetuous statesman the Union Act of 1840 was passed. This Act provided for the union of the two Canadas into one, and for the establishment of parliamentary government, as understood in England—a bicameral legislature and an executive responsible to it. Under this constitution the Second Cham-

ber (Legislative Council) was to consist of not fewer than twenty persons nominated by the Crown for life. Responsible Government as interpreted by Lord Grey in Whitehall and by Lord Elgin in Canada proved itself a conspicuous success; the friction between Legislature and Executive, almost continuous between 1791 and 1840, quickly abated; in short, the more serious of the constitutional problems was solved.

Another still remained. The nominated Second Chamber did not work smoothly, and in deference to agitation more or less persistent it was decided in 1856 to abandon the nominee system. The existing members of the Council were to be left undisturbed, but vacancies as they occurred were to be filled by election. Ontario and Quebec were to return twenty-four members apiece. The electors were to be the same as those for the House of Commons, but the electoral areas were to be larger; the term of service was to be eight years instead of four; and elections were to be held biennially—twelve senators being elected at a time. Lord Elgin expressed the opinion that 'a second legislative body returned by the same constituency as the House of Assembly, under some differences with respect to time and mode of election, would be a greater check on ill-considered legislation than the Council as it was then constituted'.[1] The efficiency of the Council set up by the Act of 1840 may not have been conspicuous, but the experiment of 1856 was at least an equal failure, and even more short-lived. Meanwhile there were other problems, racial, economic, and geographical, which the Union Act of 1840, so far from solving, served only to accentuate; and before long it became obvious that nothing less than some form of federation would satisfy the aspirations and conciliate the jealousies of the various parts of British North America. The movement towards federalism gathered force under the governorship of Lord Monck, and in 1867 the Royal Assent was given to *The British North American Act*, by which a federal form of government was established

[1] Quoted by Goldwin Smith, *Canada and the Canadian Question*, p. 164.

in the Dominion of Canada. The original units or provinces of the Federation were four: Ontario or Upper Canada, Quebec or Lower Canada, Nova Scotia, and New Brunswick. It has now been expanded to include Manitoba, British Columbia and Vancouver, Prince Edward Island, and the provinces of Alberta and Saskatchewan recently carved out of the North-West Territories—in fact, the whole of North America subject to the British Crown. Newfoundland alone, standing on its ancient dignity, has persistently refused to come into the British North American Federation.

The legislative system of this—the first—Federal Dominion under the Crown demands some detailed examination. Legislative power is vested in the King, 'an Upper House styled the Senate, and the House of Commons'; and there must be a parliamentary session 'once at least in every year'. A somewhat curiously worded clause (§ 18) provides that 'the privileges, immunities, and powers' of the Senate and House of Commons and the members thereof might be from time to time defined by Act of the Parliament of Canada, 'but so that the same shall never exceed those at the passing of this Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.'[1]

The Senate originally was to consist of seventy-two members, of whom twenty-four were assigned to Quebec, twenty-four to Ontario, and twenty-four to the Maritime Provinces of Nova Scotia and New Brunswick. Regarding the Maritime Provinces as a single division, the three divisions were thus, after the American mode, to have equal representation in the Senate. But this principle has not been maintained in subsequent amendments. An Act of the Imperial Legislature in 1871 authorized the Canadian Parliament to make provision for the representation therein of provinces subsequently admitted to the federation.

[1] Amended in letter, but not in spirit, by § 1 of the Canada Parliament Act of 1875.

Under these powers, four senators each were assigned to Manitoba, Alberta, and Saskatchewan, and three to British Columbia. Section 147 of the Act of 1867 provided that Prince Edward Island, if it elected to join the federation, should be represented in the Senate by four members, but that, in this event, the representation of the other maritime provinces, Nova Scotia and New Brunswick respectively, should be automatically reduced to ten each. The contemplated event having occurred, the Senate, by 1910, consisted of eighty-seven members apportioned to the several provinces in accordance with the above Acts.

By *The British North America Act*, 1915, the Constitution of the Senate was again altered. The number of Senators was increased to ninety-six, and the Divisions of Canada in relation to the Senate were increased from three to four, the fourth division comprising the four Western Provinces, to each of which six Senators were assigned. The aggregate of ordinary Senators was thus increased to ninety-six—twenty-four for each Division of Canada—and at the same time the maximum number who might be added by the Crown was increased to eight, making a possible total of 104.

Subject to the prescribed apportionment, Senators are appointed for life by the Governor-General—in practice on the advice of his ministers. A Senator must be thirty years of age, a British subject, a resident in the province for which he is appointed, and be possessed of property worth 4,000 dollars net in the same province. He may resign his place in the Senate at any time, and must vacate it, if (i) he is absent for two consecutive sessions; or (ii) becomes subject to foreign allegiance; or (iii) is adjudged bankrupt; or (iv) is convicted of treason or felony; or (v) ceases to be qualified.

The relations of the two Houses are defined, not too precisely, in the original *Instrument* of 1867, which contains only one provision, limiting the power of the Senate in reference either to financial or general legislation. But the Constitution declares (§§ 53, 54) that money Bills must

originate in the House of Commons and must be recommended to that House by the Governor. As to the Senate's right of amendment or rejection, the Constitution is silent. The practice is thus stated by a reliable authority: 'In the Colonies with nominee Councils (i.e. Second Chambers) there is just as little chance as in the United Kingdom of throwing out an appropriation Bill dealing with general supply. On the other hand, Bills dealing with particular items are liable to rejection just as much as any ordinary piece of legislation.'[1] For an actual deadlock between the Houses there is in the *Instrument* no direct provision, but clauses 26 and 27 seem to have been framed in contemplation of the possibility of its occurrence. The former provides that 'if at any time, on the recommendation of the Governor-General, the Queen thinks fit to direct that three or six members be added to the Senate, the Governor-General may by summons to three or six qualified persons (as the case may be) representing equally the three divisions of Canada, add to the Senate accordingly.' The equal representation of the three divisions in the Second Chamber is to be scrupulously maintained, but there is to be no swamping of the Upper House at the will of the Executive. Six additional members may be nominated, but no more.[2]

In 1873 the Canadian Cabinet advised the exercise of this power, but the Imperial Government refused to sanction it on the ground that it was not desirable for the Queen to interfere with the constitution of the Senate

'Except upon an occasion when it had been made apparent that a difference had arisen between the two Houses of so serious and permanent a character that the Government could not be carried on without her intervention, and when it could be shown that the limited creation of Senators allowed by the Act would apply an adequate remedy.'[3]

[1] Keith, *Responsible Government in the Dominions*, p. 118.

[2] British North America Act, § 28. The number of such additional members was, by the Act of 1915, to be four or eight, thus maintaining the principle of equal representation.

[3] *Canadian Sessional Papers*, 1877, No. 68.

If then constitutional deadlocks have been avoided in the Federal Legislature of Canada, it has been due less to the intelligent precautions of the authors of the Constitution than to the operation of circumstances which they would hardly claim to have foreseen, still less to have intended.

The Canadian Senate was intended to represent two principles which if not actually contradictory are clearly distinct. On the one hand it represents the principle of Crown nomination, and so far approximates to the British House of Lords. On the other it adopts, though with unfortunate timidity, the federal idea which was the root foundation of the efficient Second Chambers of Imperial Germany and the United States. And the Canadian Senate has, it must be confessed, incurred the proverbial fate of one who halts between two opinions. Mr. Alpheus Todd, it is true, in his classical work on parliamentary government in the Colonies, gives no hint of any shortcomings.

'In Colonies', he writes, 'entrusted with the powers of local self-government . . . a Second Chamber is a necessary institution. . . . It is a counterpoise to democratic ascendency in the popular and most powerful assembly, it affords some protection against hasty and ill-considered legislation and action, and serves to elicit the sober second thought of the people, in contradistinction to the impulsive first thought of the Lower House.' [1]

But, however admirable the sentiment, the expression is suspiciously *a priori*. Mr. Goldwin Smith, writing from a standpoint unmistakably concrete, had a very different tale to tell. The actual working of the Canadian Senate he compared most disadvantageously with that of the American.

'The American Senate elected by the State Legislatures is in the full sense of the term a co-ordinate branch of the Federal Congress . . . its authority is generally regarded by Americans as the sheet-anchor of the State. . . . The Canadian Senate

[1] A. Todd, p. 698.

nominated by the Crown is, on the contrary, as nearly a cipher as it is possible for an assembly legally invested with large powers to be.'[1]

The Canadian Senate is, he declared, 'treated with ironical respect as the Upper House, and surrounded with derisive state', but the ceremonious environment, the social precedence, and other attributes of the Senators are 'merely the trappings of impotence'. Mr. Goldwin Smith was not an unbiased critic of Canadian politics, yet he was a singularly shrewd observer; his historic sense was keen, and his criticisms, even if mordant in tone, command attention. Canada has now enjoyed a Second Chamber for more than a century, and the Federal Senate itself has passed its sixtieth birthday. Nevertheless, it has so far signally failed to attain the prestige which has long since accrued to the American Senate, and the question of its reform, if not of its abolition, has rarely been allowed, for any protracted period, to rest.

How are we to account for this failure? In the first place, the Canadian Senate does not, like the English House of Lords, the American Senate, and the German Bundesrat, stand for and embody a single and intelligible principle. It possesses neither the glamour of an hereditary aristocracy, nor the solid strength of an elected assembly, nor the utility of an upper chamber representing the federal as opposed to the national idea. The attempt to introduce into Canadian institutions the principle of European aristocracy was wisely abandoned more than a century ago. But the flavour still clings faintly round the Canadian Senate, though it preserves none of the advantages which belong to aristocratic assemblies. Nor has it ever frankly stood forth as the champion of the federal principle. This principle was indeed recognized in its constitution as originally designed, and equal representation is still accorded to each of the four divisions of the Dominion. But the principle of federalism was from the first accepted with reluctance by some of the most powerful statesmen

[1] *Canada and the Canadian Question*, p. 163.

in Canada, and was neutralized by the system of nomination. Sir John Macdonald, in particular, was far from cordial towards the federal system, and, though not strong enough in 1867 to resist the centrifugal forces which were then in operation, he found himself soon afterwards in a position to infuse institutions, avowedly federal, with a definite unitarian bias.

It is, indeed, hardly too much to say that a Senate, devised with the idea of giving representation to provincial interests, has been manipulated in such a way as to subserve primarily the interests of the central executive.

This points to a second reason for the failure of the Canadian Senate. Mr. Alpheus Todd may celebrate in triumphant paean the virtues of an institution 'free from the trammels of party'; of grave and reverend senators 'able to deliberate upon all public questions on their merits'.[1] Such was doubtless the ideal which the authors of the Federal Constitution of Canada set before themselves. 'The desire', said George Brown, 'was to render the Upper House a thoroughly independent body—one that would be in the best position to canvass dispassionately the measures of this (the Lower) House'. The grim reality has proved to be something vastly different. Almost from the first the Senatorial nominations have been dictated by party exigencies, naked and unashamed. 'We made our Senate', wrote Professor Stephen Leacock, 'not a superior council of the nation, but a refuge of place-hunting politicians and a reward for partisan adherence'.[2] It may perhaps be urged in explanation, if not excuse, that for good or evil the statesmen of the mid-Victorian era, both at home and in the Colonies, regarded 'responsible government' as the last word in politics. Macdonald was determined that if in Canada the phrase was to mean anything it should mean the exclusive control of patronage, in particular the patronage of senatorial nominations. In this way he sought to neutralize some of the vicious tendencies inherent in the Dominion Act. The Senate, federal

[1] *Op. cit.*, p. 699. [2] Quoted by Mackay, *op. cit.*, p. 173.

in idea, should become a facile instrument in the hands of the Ministry for the time being. For nearly a generation that Ministry was Sir John Macdonald's. Thus, writing in 1891, Mr. Goldwin Smith was able to affirm without fear of contradiction:

'Of the seventy-six senators all but nine have now been nominated by a single party leader, who has exercised his power for a party purpose, if for no narrower object. . . . Money spent for the party in election contests and faithful adherence to the person of its chief, especially when he most needs support against the moral sentiment of the public, are believed to be the surest titles to a seat in the Canadian House of Lords.'[1]

Once again Mr. Goldwin Smith may be thought to weaken a strong case by over-emphasis, but that the criticism is substantially accurate is hardly open to dispute. And the example set by Macdonald has been bettered by the most brilliant of his successors. Macdonald during his nineteen years of office appointed one Liberal to the Senate. Sir Wilfrid Laurier was guiltless of even this degree of weakness towards his Conservative opponents. It must not, however, be inferred that this distinguished statesman was satisfied with the present position of the Senate. On the contrary, he forcibly demonstrated the evils of the existing system, and advocated the substitution of an Upper Chamber elected, according to the original American method, by the legislatures of the constituent provinces.

Even this amendment would not put the Canadian Senate in a position parallel to that of the United States. The latter body, as we have seen, performs important functions apart from its co-ordinate share in legislation. It has a special part to play in the judicial and in the executive work of the country. The Canadian Senate acts as a judicial tribunal in divorce cases: indeed the severe critic already quoted declares this to be almost its only serious business. But it has no share in the Executive. It

[1] *Op. cit.*, p. 168.

suffers, therefore, as compared with the American Second Chamber in dignity and variety of functions.

One thing, however, may be said of it—whether creditable or the reverse is a question to be determined by the individual reader. The occasions of conflict between itself and the House of Commons are neither numerous nor important. Sir John Macdonald at least deserves the credit of having reduced to a minimum the possibility of a constitutional deadlock. For the first thirty years after the inauguration of the Dominion the Conservatives were almost uninterruptedly in power. For the next sixteen the Liberals enjoyed an equally unbroken tenure. Starting in 1867 with an equal number of Conservatives and Liberals, the Senate gradually assumed, in each of the three well-defined periods into which recent party history divides, the hue of the dominant party. There have been, of course, awkward moments of transition, and so long as it lasted the Conservative majority in the Senate thwarted with some success the will of a Liberal Ministry and a Liberal Lower House.[1] But Macdonald's senators gradually paid the common toll of humanity, and were replaced by the nominees of Sir Wilfrid Laurier. From 1911–21 the Conservatives were again in power under Sir Robert Borden, who followed the precedent set by Macdonald. He nominated only Conservatives to the Senate, with the result that the Liberals on coming back to power in 1921 found themselves confronted by a hostile majority in the Senate. Since 1921 the Liberals have been practically continuously in power.

That this result fails to fulfil the intentions of the founders of responsible government in Canada cannot be denied. It was hoped that the Senate, limited in numbers and surrounded with a certain dignity, would gradually come to consist of men of real eminence in various walks of life, and would by its personnel command such respect

[1] From 1874–8, 1896–1903, 1911–16, 1922–4 the majority of the Senate was of the opposite party to the majority of the Commons (cf. Mackay, Appendix C).

as would enable it to perform effectively the traditional functions of an Upper House; that it would impose delays upon ill-conceived legislative projects; that it would give time to the electorate for 'sober second thoughts'; that it would secure the country against political surprises, and would circumvent unscrupulous party stratagems. The Senate has in every respect disappointed the hopes of its sponsors. The typical senator conforms to one of three types: he is either a generous subscriber to party funds—a type not unknown even in hereditary chambers; or a successful business man who has been or may be useful to some powerful interest favoured by the dominant political party; or a mere party hack, rewarded—not perhaps illegitimately—for political services or political complaisance by the dignity of a Senatorship, with a life income of £500 a year and a railway pass. In this connexion a story quoted of Sir John Macdonald by Mr. Goldwin Smith is, if accurate, not insignificant. Referring to the selection of a candidate for the House of Commons, Macdonald wrote: 'From all I can learn W. W—— will run the best. He will very likely object; but if he is the best man you can easily hint to him that if he runs for West Montreal and carries it, we will consider that he has a claim for an early seat in the Senate. This is the great object of his ambition.'[1] It is not suggested that there is anything peculiarly immoral, in a political sense, about the proposed transaction, nor that it would be difficult to find similar cases nearer home, but the story does serve to illustrate the somewhat wide divergence between the anticipations of the idealists and the practical working of an Upper House nominated by the Ministry of the day.

That considerable dissatisfaction exists in regard to the Senate in Canada is indisputable; but it is less easy to gauge the force and direction of public opinion as to reform.[2] In Canada, as in Great Britain, there is undoubtedly

[1] *Op. cit.*, p. 168.

[2] 'It has been suggested that the House of Commons should choose the candidates (for the Senate) by ballot; that the leader of the Opposi-

a section of opinion which favours the abolition of the Second Chamber;[1] and if the choice lay between its abolition and its retention in the present form this party would probably receive a considerable accession of recruits. But it is difficult to believe that the Dominion is really impaled upon the horns of this dilemma. Is it not still possible to do what most impartial observers now agree ought to have been done in 1867: to make the Senate really representative of the constituent provinces, and to select it by a process of double election; in a word to follow the method originally preferred in the United States?[2]

The timid half measures adopted in 1867 have satisfied nobody but the party wire-pullers. A frank acceptance of the federal and elective principles might still go far to win for the Senate such a measure of political prestige and popular confidence as can alone enable it to realize the objects for which a Second Chamber presumably exists.

Against reform on these lines two objections will probably be urged. It may be said (i) that the division of powers between the Federal Government and the State Governments has proceeded on totally different principles in America and in Canada; and (ii) that while Canada has borrowed from the mother country the cabinet principle, America has not.

Both statements are true, and constitute powerful and relevant arguments in relation to the place of the Senate

tion should nominate every third candidate; that nomination should be made by provincial governments, or chosen by ballot in the provincial legislatures; or that they should be made by such public bodies as universities, chambers of commerce, &c. But no Prime Minister has as yet been able to resist the tradition of party appointments.' Other suggestions include a drastic reduction of number; age limits for retirement or appointment; restriction of powers on the lines of the Parliament Act of 1911; direct election; indirect election, &c. See Mackay, *op. cit.*, c. xi, whose own plan of reform (pp. 222–9) is worthy of attention.

[1] According to a recent (1926) and high authority, Mr. Mackay, abolition is almost unthinkable. Quebec and the Maritime Provinces would certainly resent and possibly resist it. *Op. cit.*, pp. 206 seq.

[2] As indicated above the American Senate has since 1913 been directly elected.

in the Constitution. The American Constitution is fundamentally and genuinely federal; the Federal Government enjoys only such powers as are definitely delegated to it by the Constitution; the 'unallotted residue of powers' resides in the constituent States. In Canada it is otherwise. Section 92 of *The British North American Act* enumerates the 'classes of subjects' in relation to which the Provincial legislatures may 'exclusively make laws', while Section 91 declares that 'it shall be lawful for the Queen, by and with advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces'. The difference thus accentuated between Canada and America is, in truth, fundamental. It proves to demonstration the unitary bias of Canadian federalism, and distinguishes it not only from that of the United States, but not less strikingly, as we shall see, from that of the Australian Commonwealth. Whether under these circumstances it would be wise to give to the Canadian Senate a 'frankly federal' character; whether to do so would not be running counter to the genius of the Constitution, are questions on which it would be presumptuous for a writer, unqualified by birth or by residence in the Dominion, to pronounce dogmatically. But this much may be said: that experience has proved how dangerous a thing it is to tamper with the genius of a Constitution, even for the purpose of amending proved and acknowledged deficiencies, and that Burke is, as usual, right in insisting that it is no small part of political wisdom to know how much of an evil to suffer patiently. With this trite reflection we may leave the first criticism urged by the opponents of constitutional change in Canada.

Another, still more formidable, remains. Would a federal Senate, strengthened by the application of the elective principle, be consistent with the smooth working of the cabinet system as understood in England, and successfully transplanted to the daughter-lands? On this

point American experience sheds no light. All that their publicists can tell us is that they have deliberately preferred the federal to the cabinet principle, and that 'they have made no attempt to reconcile them'. The Australian Commonwealth may in time afford some guidance; but experience of the attempt to reconcile the principle of federalism with that of a Parliamentary Executive is as yet too short to be of much practical use in guiding Canadian reformers to a wise decision.

Nevertheless it seems probable that Canada will be compelled to follow the example of Australia under penalty of incurring the risks attendant on a unicameral legislature. The existing Senate has little to recommend it; it lacks both dignity and utility. The prolonged ascendancies of two great statesmen; the all but continuous domination of the two great parties have so far averted a deadlock and have tended to obscure the unquestionable failure of the Second Chamber devised by the Constitution of 1867. Should different conditions prevail in the near future, should party oscillations be as rapid and violent in Canada as elsewhere, it is difficult to believe that the Senate could in its present form survive. To put the Second Chamber upon a basis at once firm, dignified, and intelligible, would seem therefore to be the obvious duty of conservative statesmanship in the Dominion.

[The position of the Canadian Senate is discussed in several recent works: notably by R. A. Mackay: *The Unreformed Senate of Canada* (Oxford 1926); G. W. Ross: *The Senate of Canada* (Toronto 1914); H. B. Lees Smith: *Second Chambers in Theory and Practice* (London 1923), and more summarily by W. P. M. Kennedy, *The Constitution of Canada*, and Lord Bryce, *Modern Democracies*. My own *Mechanism of the Modern State* (Oxford 1927) deals with it in some detail.]

VIII. SECOND CHAMBERS IN THE OVERSEA DOMINIONS—AUSTRALIA

'All those checks and balances in the English and American Constitutions by which the censors of Democracy used to set such store have here dwindled down to one only, viz. the existence of two Chambers.'—BRYCE on *The Australian Commonwealth.*

BETWEEN the Federal Constitution of Australia and that of British North America there are many striking and important points of difference, and none, perhaps, is of greater significance than that presented by the constitutional position and powers of the federal Second Chamber. But between the earlier stages of political evolution in the two cases there is a close resemblance. Colonial government is frequently described as having exhibited a symmetrical development from Crown Colony government to Representative Institutions without a responsible Executive; thence to 'responsible government', and finally to Federation. The formula, though open to criticism as a generalization,[1] indicates accurately enough the stages through which Canada and the Australian Colonies have alike passed. The former having been described in the previous chapter, it will not be necessary to describe in like detail the stages in the constitutional evolution of the several Australian Colonies prior to the consummation of the existing Federal Constitution of 1900.

New South Wales—the Mother-State of most of the Australian Colonies—rediscovered by Cook in 1770, was first utilized as a penal settlement in 1787, in consequence of the natural refusal of the Carolinas any longer to receive English convicts. For thirty years it remained to all intents and purposes a convict settlement, and nothing more; but the pressure of drought led to the exploration of the Blue Mountains in 1813; it was discovered that New South Wales offered incomparable facilities for sheep

[1] Cf. Keith, *op. cit.* p. 1.

grazing, and in 1821 the Colony was opened to free immigrants. For a time the Free-settlers and the 'Emancipists' lived side by side, but in 1840 the transportation of convicts was forbidden by an Order in Council, and New South Wales became the home of freemen.

This change, combined with the fact that in the same year Canada received the privilege of responsible government, naturally aroused a desire for a change of system in Australia. Hitherto the Colony had been governed under strict military law, and, even so, the task of government, as may be imagined, was difficult enough. But in 1842 a Legislative Council, consisting of twelve nominated, and twenty-four elected members, was established. This did not long satisfy aspirations stimulated by the example of Canada, and in 1850 an Act was passed by the Imperial Parliament, which gave general powers to the several Australian Colonies to settle for themselves the exact form of their Constitutions. They quickly acted on this permission, and in this way the parent Colony of New South Wales, with its offshoots, Victoria, Tasmania, and South Australia, attained to the dignity of responsible government in 1855. In each case provision was made for a bicameral legislature and an executive responsible to the legislature. In New South Wales, the members of the Legislative Council or Second Chamber were to be nominated for life by the Governor; in Victoria and Tasmania they were to be elected for a term of six years, and in South Australia for a term of nine. Queensland, another offshoot of New South Wales, was entrusted with responsible government from its first establishment as an independent colony in 1859. New Zealand attained to the same dignity in 1856, and Western Australia in 1890.

A more particular word must be added as to the position of the Second Chamber in the several Colonies which now form the Australian Commonwealth. For without such a preliminary word it would be difficult to render intelligible the provisions which experience and prudence have combined to dictate in the Federal Act of 1900.

In New South Wales the Legislative Council consists of not less than twenty-one nominated members. Unless they happen to be ministers, the members are unpaid, but they travel free on the railways of the State. To the number of nominees there appears to be no legal limit, and the Council at present (1927) consists of seventy-seven members. In this respect the Second Chamber of New South Wales is peculiar. In nearly all other Colonies the size of the Upper Chamber is precisely defined by statute, and the absence of any such provision in this case has led on at least one occasion to considerable difficulties. The most notorious case was that of Sir Charles Cowper, who swamped the Upper House with his nominees. The Governor, Sir John Young, was rebuked by the Home Government for permitting this, and a serious monition was issued from Whitehall to the effect that the 'number of Legislative Councillors should be limited to what is convenient, and that no nominations should ever be made merely for the purpose of strengthening the party which happens to be in power'.[1]

So things remained until the régime of Sir Henry Parkes, who reopened the question by a demand that the relations between the Executive and the Legislative Council should be readjusted so as to bring them into conformity with recent English practice. There had been various disputes, chiefly on fiscal questions, between the two Chambers, and Parkes definitely asked for a recognition of the principle that ministers might recommend to the Governor the creation of Councillors. Mindful of the rebuke to Sir John Young, the Governor referred the matter to the Secretary of State, who, while disclaiming a desire to interfere in the domestic concerns of the Colony, demurred to the proposed increase of members. But in 1889 Parkes was more successful in obtaining from Lord Carrington permission to add members to the Legislative Chamber at the convenience and discretion of the Executive. That principle, closely akin to one which has long prevailed in the mother country,

[1] Jenkyns, *op. cit.* p. 67.

may now be regarded as securely enshrined among the constitutional conventions of the Colony.[1]

Queensland, alone of the Australian Colonies, has decided to dispense with its Second Chamber. For some time previous to the abolition of the Legislative Council, in 1922, there had been friction between the two Houses. In 1885 the quarrel came to a head in reference to the claim of the Second Chamber to amend money Bills. An appeal to the Privy Council resulted in a decision adverse to the claim of the Legislative Council. 'It was held that the position of the Council was analogous to that of the House of Lords, and that the control of supply rested with the Lower House, subject merely to a right of rejection, where such right could be exercised by the Lords.'[2] In 1907 another deadlock between the two Houses occurred. More than one important Bill proposed by the Government was rejected in the Upper House, and the Premier, Mr. Kidston, asked the Governor to allow him to appeal to the country. Lord Chelmsford refused; the Kidston Ministry resigned, and the leader of the opposition took office (1907). The House of Assembly refused supplies, and Lord Chelmsford thereupon dissolved Parliament. The country returned the Progressives to power, and the final result was an important revision of the Constitution. An Act was passed (1908) to repeal the provision of the Constitution Act of 1867, whereby a two-thirds majority in both Houses was required for an amendment in the composition of the Council, and a further guarantee was taken against a deadlock between the two Houses in the future. A Bill which had been passed by the Assembly and rejected by the Council, and again in a subsequent session a second time passed and rejected, might be submitted by *referendum* to the electorate. If it was supported by a simple majority of those voting, it was forthwith presented to the Governor for his assent. By this means the will of the Lower House could be made to prevail 'within the limits of a single Parliament', but only provided that the proposed measure

[1] Keith, p. 124. [2] *Ibid.*, p. 127.

obtained the specific assent of the electorate.[1] Even so the Labour Party was not satisfied, and continued to press for the abolition of the Legislative Council. A Bill to effect that object passed through the Lower House in 1915, and again in 1916, but was rejected in each case, by an overwhelming majority in the Legislative Council. Submitted to a *referendum* under the Act of 1908, the Bill was decisively rejected. Whereupon the Labour majority in the Lower House swamped the Legislative Council and the Bill passed through both Houses in 1921. Having been transmitted to the Secretary of State for the signification of His Majesty's pleasure, the King declared his assent to it on 3 March 1922, on the ground, as stated by Mr. Winston Churchill, then Secretary of State, that the 'policy of the Bill being one of purely local concern, it would not be in accordance with established constitutional principles that His Majesty's advisers should intervene to prevent the Bill from becoming operative'.[2]

In the existing Constitution of South Australia, also, there is a provision approximating to a *referendum*. The Second Chamber there, unlike tnat of New South Wales, is not nominated, but elected. It consists of twenty-five members elected for the five districts into which the Colony is divided, by electors who are possessed of a fairly substantial property qualification. Half the members of the Council retire every three years, and are not re-eligible. Members must be thirty years of age, and have been resident in the State for three years. They receive £400 a year, and a free railway pass. Except under special circumstances, to be noted presently, the Council cannot be dissolved by the Executive. Despite—or perhaps in consequence of—the elective character of the Upper House, the relations between the two Houses have not been monotonously smooth. Early in the sixties the Lower House attempted to ignore the existence of the Council in regard

[1] Keith, *Responsible Government*, pp. 128–9.

[2] On the whole question cf. the very interesting *Correspondence*, Cmd. 1629 of 1922.

to supply, until its usurpation was checked by the refusal of the Governor to sanction the issue of funds except under the authority of Bills which had received the assent of both Houses. Friction nevertheless continued until in 1881 a device was adopted to put a stop to deadlocks between the Houses. Under that Act, as amended in 1901 and 1908, it is provided that if a Bill is twice passed by the Assembly, the Governor may either dissolve *both* Houses, or may call up by election to the Second Chamber not more than nine additional members. Here again it must be noted that no Bill can be forced through the Upper House without an appeal to the electors of one or both Houses—according to the discretion of the Governor. Should the Upper House remain obdurate after such an appeal, there would seem to be no further constitutional means of bringing the two Houses into agreement.

Not widely dissimilar is the position of the Second Chambers in Tasmania and Western Australia. In the former the Legislative Council consists of eighteen members, elected for six years, by electors possessing a moderate property qualification. Money Bills must originate in the Assembly, but may be rejected and even amended by the Council, which has persistently maintained a strictly co-ordinate right in regard to general legislation In Western Australia the Legislative Council was at first nominated, but provision was made that as soon as the white population of the colony reached 60,000 it should become elective. The Council now consists of thirty members, elected for a period of six years by the ten electoral provinces into which the Colony is divided. The electors must possess a fairly high property qualification. Members must be thirty years of age, and have been resident in the Colony for two years. They receive £400 a year and a free railway pass. The Council has co-ordinate powers in general legislation, and in regard to money Bills it may return a Bill to the Lower House, with a request for alteration, but cannot insist upon the alteration should the Assembly refuse it.

Of all the States which now constitute the Commonwealth, the experience of Victoria, as regards the point under discussion, has been the most varied, and perhaps the most instructive. That Second Chamber is said by one who speaks with authority, to be 'from the democratic point of view the most objectionable of all the Australian Upper Houses'.[1] But it is not easy for an outsider to understand the ground for this objection, unless it be that conflicts between the two Chambers have been in Victoria unusually frequent, bitter, and prolonged.

The Victorian Legislative Council consists of thirty-four members, elected for six years. Half the members retire every three years. They are unpaid,[2] and must possess estate of the net annual value of £50. The electors also, unless they are University graduates, or are otherwise qualified by one of several 'fancy' franchises, must possess freehold property worth £10 a year, or leasehold worth £15. It may be that this property qualification has accentuated the friction which has repeatedly manifested itself between the two Houses, and has turned largely upon the question of 'tacking'. In 1866 the Council rejected a Bill for the introduction of a high protective tariff, which had been 'tacked' by the Assembly to the Appropriation Act. The Assembly 'thereupon induced the Governor to permit the levy of duties merely on the strength of a resolution of the Assembly, to borrow money without a law, and to pay official salaries without an Appropriation Act'.[3] For this conduct the Governor was sternly reprimanded by the Secretary of State, and ultimately recalled. The Assembly retorted by voting a gratuity of £20,000 to Lady Darling, the wife of the retiring Governor, and, to coerce the Council into endorsing the proposal, tacked it on to an Appropriation Bill. The Council rejected the Bill, and a deadlock ensued, which was terminated only by the intimation from the

[1] H. de R. Walker, *Australian Democracy*, p. 121.

[2] They now (1927) receive £200 a year: less by £100 than Tasmania. Only in New South Wales (a nominated Chamber) are members still unpaid.

[3] Keith, pp. 107–8.

Governor that he would prefer not to accept the gratuity.[1] In 1894 the Council rejected a budget, on the ground that the proposal to levy a tax upon unimproved land values raised a principle which ought to be submitted to the electorate; and in the following session the Council rejected an electoral Bill for the abolition of plural voting and the enfranchisement of women.[2] Not until 1903 was any solution reached of the constitutional difficulties between the two Houses. In that year the Council was formally invested with the right of suggesting alterations in money Bills, and at the same time provision was made for a dissolution of the Council in the event of a deadlock.[3]

It will be seen, therefore, that the disputes between the two Legislative Chambers in the several Colonies of Australia have been neither infrequent nor insignificant, and have been most frequent and most bitter in the Upper Houses which are constituted on an elected basis. On this point the testimony of the late Mr. Bernard Wise was unequivocal. He declared that of all the devices employed to bring the two Chambers into harmony the most effective had been the constitution of the Upper House by nominees of the Governor-in-Council. 'This plan gave the Second Chamber something of the influence and attributes of the House of Lords. It was constrained by its own traditions to yield before any clear manifestation of the popular will and could at any time be coerced by the appointment of new members.' On the other hand, the apparently more democratic device of elective Upper Chambers, as in Victoria and South Australia, had proved a constant source of political trouble. 'On whatever suffrage or by whatever electorate a Legislative Council was elected, it could resist any measure of the Assembly so long as it retained the support of its own constituents, and this could only be ascertained by a General Election which would be punitive to the Assembly also.'[4] In view of the constitutional disputes detailed above, it is the more remarkable that in

[1] Keith, p. 108. [2] Walker, p. 125. [3] Keith, p. 111.
[4] Wise, *Commonwealth of Australia*, pp. 202–3.

the long discussions which preceded the consummation of the Federal Commonwealth, no proposal for the erection of a unicameral legislature ever obtained any serious or influential support.

The Second Chambers in the States of Commonwealth play, says Bryce, 'a subordinate and little-noticed part' in politics. Yet they serve a useful purpose, and their record, taken as a whole, supports in his judgement the case for the existence of a revising Chamber. Though they have sometimes delayed good measures 'they have often improved legislation by giving time for the people to look where they were going, and by thus compelling the advocates of hasty change to reconsider and remodel their proposals'.[1] This is valuable and significant testimony.

Lest it should be thought that disproportionate attention has been given to the working of the State Constitutions in Australia, let it be remembered that in Australia, unlike Canada, the residue of powers not specifically assigned to the Commonwealth is vested in the States. Consequently some knowledge of the State Constitutions is essential to an understanding of the corresponding provisions in the Commonwealth Act. The framers of that Act were familiar with the working of the Colonial Constitutions; most of them had had personal experience of the difficulties encountered and of the solutions attempted,—frequently, as we have seen, with indifferent success. It is not, therefore, remarkable that they should have attempted to define the relations between the two Houses of the Legislature with unusual precision, and should have adopted precautions unusually elaborate for averting or terminating constitutional deadlocks. But it is, under the circumstances, unmistakably significant that they should have deliberately resolved to create a Second Chamber which is in some respects (to be hereafter specified) the most powerful in the British Dominions.

From this as from other points of view the Commonwealth Constitution is of exceptional interest to the student

[1] *Modern Democracies*, ii. 203.

of political science. It represents, as Bryce suggestively remarks, the quintessence of the political experience of the world down to the close of the nineteenth century:

'Every creation of a new scheme of government is a precious addition to the political resources of mankind. It represents a survey and scrutiny of the constitutional experience of the past. It embodies an experiment full of instruction for the future. The statesmen of the Convention which framed this latest addition of the world's stock of Instruments of Government had passed in review all previous experiments, had found in them examples to follow and other examples to shun, had drawn from them the best essence of the teachings they were fitted to impart. When the Convention prepared its highly finished scheme of polity, it delivered its judgement upon the work of all who had gone before, while contributing to the materials which will be available for all who come hereafter to the work of building up a State.'[1]

It represents also the high-water mark of popular government; in every section it is interpenetrated by the spirit of Democracy. And it came slowly to the birth. The expediency, if not the necessity, of some form of union among the several Colonies in Australia, became obvious at a very early stage in the history of English settlement on that continent. So long ago as 1849 the Committee for Trade and Plantations, to which Earl Grey referred the question of the better government of the Australian Colonies, adumbrated a scheme. They recommended that there should be a Governor-General for all Australia, who should have power from time to time to summon a General Assembly representative of all the Colonies with power to legislate on certain matters of common concern, and to establish a Supreme Court of Judicature. A Bill framed on these lines was submitted to the Imperial Parliament in 1850, but was received without enthusiasm either in the Colonies or at home, and its main proposals were dropped For ten years, however (1851–61), the office of Governor-General was maintained. But the time for closer union

[1] Bryce, *Studies in History and Jurisprudence*, i. 469.

was not yet; and not until 1884 were any definite steps taken to that end. The story of Australian federation may, however, be read in the admirable work of Mr. Harrison Moore[1] or in Bryce's brilliant essay, and cannot in this place be retold. Enough to say that the Act which received Queen Victoria's Royal Assent in 1900 was the outcome of ten years' almost continuous work. It began with an intercolonial conference of Ministers at Melbourne in 1890; in 1891 Delegates from all the Australian Parliaments met, and drafted a Bill which was temporarily hung up by the severe financial crisis of 1893; the Prime Ministers again met at Hobart in 1895, with the result that enabling Acts were passed by the several Colonial Parliaments under which special Delegates were elected by popular vote to a Convention which met at Adelaide in 1897. In this Convention the work was practically accomplished: a Constitution based mainly on the scheme of 1891 was drafted, and was submitted to the several Colonial Legislatures, and by them was freely amended. The Draft as thus amended was reconsidered by the Adelaide Convention, and was by it submitted to a *plébiscite* in each Colony. Only New South Wales failed to ratify it by the prescribed majority, but after further amendment at the hands of a Second Conference of Premiers the assent of New South Wales was obtained, and the Constitution in its penultimate shape was sent home for the consideration of the Imperial Parliament. With one not unimportant amendment it was approved at Westminster and received the Royal Assent in the last year of Queen Victoria's reign. That assent was more than formal, for it was accompanied by the Queen's fervent prayer 'that the inauguration of the Commonwealth may ensure the increased prosperity and well being of my loyal and beloved subjects in Australia'.

This bare enumeration of the stages through which the Commonwealth Constitution passed has been inflicted upon the reader of set purpose. It is important that he

[1] *Commonwealth of Australia*, pp. 19–61.

should realize that no Constitution was ever brought into being with more circumspection and deliberation, with more intense anxiety to omit nothing that could contribute towards, to include nothing that could militate against, the successful consummation of Australian federal unity.

With the general results which have been thus attained I am not here concerned. But it is pertinent to insist that upon no part of the scheme was more meticulous care and criticism expended than upon the Constitution of the Legislature, and more particularly that of the Second Chamber.

The root principle of the Senate is most graphically suggested by the alternative titles which were considered for it: the *House of the States*, or the *States Assembly*. Like the American Senate and the German Reichsrat, it represents the federal principle; it stands for the Constituent States. Like the American Senate, it accords to each State equal representation—a principle not asserted without strong and intelligible protests from the larger States. To the smaller States, on the other hand, this principle was the condition precedent, the 'sheet anchor' of their rights and liberties. And, once asserted, it is fundamental and (except in unimaginable conditions) unalterable.

The Senate consists at present of thirty-six members—six for each State; but it is provided by the Constitution (§ 7) that 'Parliament may make laws increasing or diminishing the number of Senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six Senators'. Further: in the section defining the machinery for constitutional amendment (§ 128) it is provided that 'no alteration diminishing the proportionate representation of any State in either House of the Parliament . . . shall become law unless the majority of the electors voting in that State approve the proposed law'. The Senators are to be 'directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate' (§ 7). The latter stipulation has proved

to be, perhaps unexpectedly, important. The voting is by *scrutin de liste*: each voter has as many votes as there are places to be filled. This method, as is well known, permits, if it does not encourage, a good deal of political manipulation, and enables a well-organized majority to sweep the board. But its significance in relation to senatorial elections in Australia can only be appreciated to the full if it is remembered that the qualification of a Senator is identical with that of a member of the House of Representatives, and that the electors to both Houses are the same. The power of the Senate is thus drawn from precisely the same source as the Lower House, and it is drawn, as Mr. Wise pointed out, 'in the concentrated form of support from large constituencies.' With the result that it is the only Upper House in the world which is less conservative than the Lower.[1] It should be added that the Senate is elected for six years, while the Lower House is elected for three, and that half the Senators retire triennially. The provision for filling casual vacancies is, as Mr. Harrison Moore says, 'curiously complex and minute.' If the vacancy is notified while the State Parliament is sitting, the Houses of Parliament of the State 'shall, sitting and voting together, choose a person to hold the place until the expiration of the term or until the election of a successor . . . whichever shall first happen'. If the State Parliament is not in session 'the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until fourteen days after the beginning of the next

[1] This statement was accurate when it was originally made (1910); but for reasons given later in this chapter it must now be modified. Bryce (*Modern Democracies*, ii. 204 seq.) holds that the event has falsified all the expectations and aims wherewith the Senate was created. The Lower House has attracted to itself most of the (not too plentiful) political talent available. But, in fact, the centre of political life—when the Socialist Party is in the ascendant—is outside either House and resides in the Labour Caucus, where Senators and Representatives sit side by side. The truth is that representative government is apt to be successful only when there is a considerable leisured class upon which the Legislature and Executive can draw. Such a class is the product of centuries of civilization. The Australian Commonwealth is less than thirty years old.

session of the Parliament of the State or until the election of a successor, whichever first happens. At the next election of members of the House of Representatives or at the next election of Senators for the State, whichever first happens, a successor shall, if the term has not then expired, be chosen to hold the place from the date of his election until the expiration of the term' (§ 15). These minute regulations at any rate testify to the extreme importance which is attached by the most democratic community in the world to membership of the Second Chamber.

One or two other points in regard to the composition and procedure of the Senate demand attention. Unlike the German Reichsrat, it is, though federal in constitution, 'unitary in action.' It is expressly provided (§ 11) that 'the Senate may proceed to the dispatch of business notwithstanding the failure of any State to provide for its representation in the Senate', and (§ 22) that the presence of one-third of its members (until the Parliament otherwise provides) shall form a quorum. Another point which marks a contrast between the Senate and the Reichsrat is that in the Senate the voting is personal and not according to States. Each Senator has one vote, and any question which may arise is determined by a simple majority.

A noticeable attribute of the Senate, but one which it shares with Second Chambers in general, is that of 'perpetual existence'. Except in the event of a constitutional deadlock, it cannot be dissolved. Thus the Senate, unlike the Lower House, is never, except under the circumstances alluded to, wholly new or wholly old.[1]

The qualification for senatorships is exceptionally easy. A Senator must be of full age; he must be a natural-born subject of the King, or a subject naturalized according to the laws of the United Kingdom or any of the constituent States; and his 'qualification' must be 'in each State that which is prescribed by this Constitution or by the Parliament, as the qualification for electors of members of the House of Representatives' (§ 8). No person may continue

[1] Harrison Moore, p. 98.

to sit, in either House, under heavy penalties, who is convicted of serious crime, or becomes bankrupt, or 'has any direct or indirect pecuniary interest in any agreement with the public service of the Commonwealth', or 'holds any office of profit under the Crown or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth'. But it is provided that this last disqualification shall not exclude Ministers of the Commonwealth or the States, and elsewhere (§ 64) it is expressly laid down that 'no Minister of State shall hold office for a longer period than three months unless he is or becomes a Senator or a member of the House of Representatives'. Not even in the United Kingdom itself is the correspondence between Legislature and Executive so closely and securely guaranteed. In regard to remuneration Senators and members of the Lower House are treated alike—each receiving £400 a year.[1]

The functions of the Senate, unlike those of the House of Lords and of the American Senate, are purely legislative; but, subject to an exception to be noted presently, the Senate has 'equal power with the House of Representatives, in respect of all proposed laws' (§ 53).

As regards finance the provisions of the Constitution are of peculiar interest. Money Bills must originate in the Lower House. The Senate may reject but may not amend them, though it may 'at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting by message the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications'. Moreover, the precautions against 'tacking' and against the introduction of any alien substance into a finance Bill are exceptionally minute and specific. Thus, under Section 53, 'a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition of fines,' &c.

[1] Now (1927) £1,000 a year.

Under Section 54 it is provided that 'the proposed law which appropriates revenue or moneys for the ordinary annual service of the Government shall deal only with such appropriation'. Section 55 enacts that

'Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.

Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.'

These provisions not only afford guarantees against tacking, but no less effectually provide against the device which, following the lead of Mr. Gladstone, the British House of Commons has employed since 1861. There can be no 'omnibus' Budget under the Constitution of the Australian Commonwealth. Thus, as Mr. Harrison Moore justly observes:

'The Constitution . . . prevents the House of Representatives from taking a course which might justify or excuse the Senate in rejecting an Appropriation Bill. In the balance of power in the Commonwealth, it is a factor not to be neglected that, while the Senate has a recognized power over Money Bills beyond that of any other Second Chamber in the British Dominions, it can hardly exercise the extreme power of rejecting the Bill for the "ordinary annual services of the Government" upon any other ground than that the Ministry owes responsibility to the Upper not less than to the Lower House. That is a position which in the future the Senate, as the House of the States as well as the Second Chamber, may take up; but it is a position from which, even in the history of Parliamentary Government in the Colonies, the strongest supporters of the Upper House have generally shrunk.'[1]

In view of the experience gathered in the working of the State Constitutions it was natural that the authors of the Commonwealth Act should be at special pains to

[1] *Op. cit.*, pp. 122–3.

devise effective machinery for the solution of 'deadlocks'. The originality and ingenuity of the Section (§ 57) dealing with this matter justifies quotation *in extenso*:

'If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

If after such dissolution the House of Representatives again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

The members present at such a joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried, is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent.'

The machinery here described was devised, as is well known, after the consideration of many alternative solutions. One party, that of the National Democrats, favoured a Referendum, an appeal to the whole body of electors in

the Commonwealth. But this solution was naturally distasteful to the smaller States. Others preferred the remedy of dissolution 'to be applied alternatively, simultaneously, or successively to the Senate and the House'.[1] The device ultimately adopted was inspired, according to Mr. Harrison Moore, partly by the experience of South Australia, but, more specifically, as regards the joint sitting, by the Norwegian system, 'according to which the two Chambers (or rather the two parts into which the House is divided) meet as one for the purpose of composing their differences'. But whatever the source of the inspiration, the device is undeniably ingenious and makes effective provision against the weaknesses and dangers which have been all too clearly revealed in the Constitutions of the several States.

It is to be observed that on any Bill, whether dealing with finance or not, the Senate can 'force a dissolution'; that the Lower House cannot override the will of the Senate until after an appeal to the electorate, and then only if the will of the electors is declared with emphasis. In this connexion the importance of the stipulation that the numbers of the House must always be double those of the Senate becomes apparent. But for this provision[2] the balance contemplated by the authors of the Constitution might be seriously disturbed. As it is, the will of the people, as measured by population, must in the last resort prevail against the will of the States, as revealed in the composition and voting strength of the Senate—a further illustration of the democratic spirit by which every part of the Constitution is permeated.

There remains to be noticed the position of the Senate in the machinery devised for constitutional revision. In the Canadian Dominion there is no such machinery. The source of Canada's Constitution is an Act of the Imperial Legislature, and to the same source she must look for the

[1] Harrison Moore, pp. 124–7.

[2] § 24. 'The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of senators.'

amendment of it. In the United States the precautions against hasty and ill-considered amendments are such as almost to preclude amendment altogether. In the Australian Commonwealth the machinery, though elaborate, is decidedly less complicated and less cumbrous.

Every proposed law for the alteration of the Constitution must be passed by an absolute majority of each House, and must then, after an interval of not less than two and not more than six months, be submitted to the electors in each State. In order to become law the amendment must be approved by (i) a majority of States, and (ii) a majority of electors in the Commonwealth as a whole. But here as elsewhere State rights are safeguarded, for, 'no alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise affecting the limits of the State . . . shall become law unless the majority of the electors voting in that State approve the proposed law'. Repeated efforts have, as a fact, been made to obtain a revision of the Constitution, primarily with a view of enlarging the powers of the Commonwealth, and incidentally for the purpose of facilitating socialistic legislation. Those efforts have been invariably defeated on an appeal by Referendum to the electorate. Of all the Referenda—fifteen or more—since the establishment of the Commonwealth two only have been carried, and neither of these was on a constitutional issue of first-rate importance.

The Labour Party in Australia is, however, determined upon revision, and in particular upon an amendment of the terms of the Instrument concerning the Senate. During the earlier years of the Commonwealth, the Senate was, as we have seen, the stronghold of the Labour Party. So long as that lasted, the Party was well content with the situation. It is far otherwise to-day. At the last Senatorial election (1925), when twenty-two seats were to be filled, the Labour Party failed to secure one, and now (1927) holds only nine seats. It is, therefore, not remarkable that

threats of 'revision' should be uttered with increasing vehemence.

While, however, the electors have proved to be, in respect of constitutional amendments, rigidly conservative, the High Court has freely exercised its great power of revision. The Court is, under the Constitution, the final interpreter of the Constitution.[1] A large field of legislation has by the decisions of the High Court been excluded from the jurisdiction of the States and attached to that of the Commonwealth. To those who are dissatisfied with the decisions of the Court there remains, indeed, resort to a Referendum; but that weapon has, as we have seen, broken, up to now, in the hands of the party which sought to validate legislation declared by the Court to be invalid.

For the event of disagreement between the two Houses on constitutional amendments there is special and interesting provision. Such amendments may, be it noted, originate in either House, but should the Houses differ, the originating House may, after an interval of three months (even in the same session), again pass the amending Bill, and, in the event of a second rejection, the Governor-General may submit it to the electors. Their decision is final. The wording of the clause—'the Governor-General may submit'—would appear to leave to the Executive in such cases a discretion as to the employment of the referendum. But it is obvious that a Ministry, anxious for revision, and backed by either House of the Legislature, would never hesitate to submit its proposals to the electorate.

The intentional ambiguity of the last sentence raises a question which must, if possible, be answered before the discussion of the position of the Second Chamber can be regarded as complete.

To whom is the Ministry responsible? To the Senate, or to the House of Representatives, or to both Houses?

The question cannot be answered by the simple assertion that a Cabinet is invariably responsible to the demo-

[1] § 74 and 76, and Acts No. 6 of 1903 and No. 8 of 1907.

cratic Chamber. For in the Commonwealth it is difficult to say which of the two Chambers is the more 'democratic'. In practice, the Senate, unique in this as in other respects among Second Chambers, proved to be, if not the more democratic, certainly in the earlier years of the Commonwealth the less conservative. Being elected, as we have seen, by 'general ticket', the Senate was captured by the best disciplined party. That party, in most of the Australian States, was the Labour Party, and the consequence was that for several years the Senate exhibited many of the characteristic features of a Labour Convention. 'The Chamber', says Mr. Brand, 'which is usually supposed to act as a drag on revolutionary legislation, has largely occupied itself in passing academic resolutions in favour of the nationalization of all means employed in the production and distribution of wealth and other projects of a socialistic character.' [1]

The menace to the Cabinet principle involved in the existence of two Chambers, virtually co-ordinate, and, still more in the formation of a federal union, was not unforeseen. 'Either federation will destroy responsible government, or responsible government will destroy federation. . . . There cannot be a responsible government which is responsible to two Houses.'[2] So spake Sir Richard Baker, afterwards the first President of the Senate. And that he expressed the misgivings of many thoughtful minds cannot be doubted. 'Australians', said Bryce, 'evidently expect that the usage hitherto prevailing in all the Colonies of letting the Ministry be installed or ejected by the larger House will be followed. Nevertheless, the relations of the Commonwealth Houses are so novel and peculiar that the experience of the new Government in working them out will deserve to be watched with the closest attention by all students of politics.' The time which has elapsed since Bryce wrote has certainly not diminished the interest with

[1] *Union of South Africa*, p. 67. (These words were written in 1909, and the situation, as already explained, has radically changed since that time.)

[2] ap. Wise, p. 194.

which the Australian experiment is watched. But even yet it is impossible to say with certainty how it will work out. It is, however, clear that the Commonwealth has not impaled itself on either horn of the dilemma suggested by Sir Richard Baker. Responsible government has not proved to be incompatible with the maintenance of effective federal unity. As to the soundness of his other constitutional aphorism it is too soon to pronounce definitely. Mr. Bernard Wise expressed the opinion 'that the usefulness of the Senate as a revising and legislative Chamber has been due to the obliteration of its original functions as a States House.' And in this sense responsible government is 'killing Federation'.[1] But even if the opinion be sound, the 'sense' is admittedly restricted. The Second Chamber may have proved to be a somewhat less centrifugal force in the Constitution than was intended and anticipated, but it nevertheless stands for the federal as opposed to the national idea, and it is still 'the sheet anchor' of the smaller States. In the last resort, it is true, the will of the nation does prevail against that of the States. This was the deliberate intention of the Act. But in practical politics last resorts are not quickly or frequently reached. Compromise is of the essence of the party system—particularly of the party system as worked and interpreted by men of English blood. The working of the Commonwealth Constitution has proved to be no exception to this rule. And in no respect has the spirit of compromise been more conspicuous or more essential than in the working of 'responsible government' under two Chambers, equally democratic in structure, in origin, and in personnel, but representative, nevertheless, of ideals which are distinct and which might easily become conflicting.

[1] *Op. cit.* p. 209.

IX. SECOND CHAMBERS IN THE OVERSEA DOMINIONS—SOUTH AFRICA

Λέγεταί τις παροιμία ὅτι ἀεὶ φέρει Λιβύη τι καινόν.
ARISTOTLE.
(As the proverb goes, 'Africa is for ever producing some novelty')

THE last four chapters have been concerned with Constitutions which, differing widely in other respects, are alike in this: they are all federal, and their federal character is reflected and embodied more particularly in their respective Second Chambers.

We now proceed to the analysis of a Constitution which, though federal in appearance and actually federal in several respects, must nevertheless be scientifically catalogued as unitary. Despite this fact, the Second Chamber of United South Africa has something of a federal character. This paradox, not the sole nor perhaps the most striking, is eminently characteristic of a paradoxical Constitution. But it does not render the Second Chamber less worthy of the attention of the student of Institutions.

To follow in detail the constitutional evolution of the four Provinces which now compose the South Africa Union would be as tedious as it is, after the recital contained in the two previous chapters, unnecessary. It is enough to say that Cape Colony attained to the dignity of 'responsible' government in 1872, Natal in 1893, the Transvaal in 1906, and the Orange River Colony in 1907. In all these Colonies before their absorption in the Union the Legislature was bicameral. In the Cape Colony the Upper House or Legislative Council consisted of twenty-six members, elected for seven years by the electors who elect the Assembly. The Chief Justice was *ex-officio* President of the Council. In Natal the Council consisted of thirteen members nominated for a period of ten years by the Governor on the advice of his ministers.

In the Responsible Constitutions conceded in 1906 and 1907 by Letters Patent to the Transvaal and Orange River

Colonies it was provided that the Council should consist of fifteen and eleven members respectively, and that they should be nominated in the first instance by the Governor, but ultimately be elected, for a period of five years.

These details are, in the case of the Cape Colony and Natal, of merely historical, and in that of the Transvaal and the Orange River Colony, of merely academic interest. For by the South Africa Act (1909) the existing Colonial Constitutions were entirely swept away. In accordance with the essentially unitary character of the Union Act the Colonies have been reduced to the status of Provinces, endowed with control only over purely local affairs.

The Union Act provided that the Senate, for the first ten years after the establishment of the Union, should be constituted as follows: (*a*) eight Senators to be nominated for a term of ten years, by the Governor-General in Council; and (*b*) eight Senators elected by each of the four original provinces.

The Senate, therefore, has consisted of forty members. Of the eight nominated by the Governor-General four are selected 'on the ground mainly of their thorough acquaintance, by reason of their official experience or otherwise, with the reasonable wants and wishes of the coloured races in South Africa'. The eight members representing each province were in the first instance elected, also for ten years, in a joint session of the two Houses of the expiring Colonial Legislatures. They were elected on the principle of proportional representation according to the system known as that of the single transferable vote.

These provisions were to remain in force for ten years only; after the expiration of that period the South African Parliament was authorized to provide for the constitution of the Senate in any manner it might see fit, or it might leave things as they were. In fact it was decided that the elected members of the Senate should in future be chosen by the Provincial Council of each province acting conjointly with the members of the House of Assembly representing that province in the Union Parliament. The reasons

for giving a temporary character to provisions of first-rate importance are curious and characteristic. There was, in the first place, an ardent desire to emphasize one of the outstanding features of the Constitution as a whole: its essentially unitary character. Of unitary constitutions there is no more striking attribute than the 'sovereignty' of the Legislature. To this specific test the South African Constitution reacts. Its Parliament is as nearly 'supreme' as a Colonial Parliament can be. It is, of course, subject, as every Parliament in the Empire is, to the ultimate jurisdiction of the Imperial Parliament.[1] But as regards South Africa it is supreme. There is no law which it cannot make, amend, or repeal. For constitutional amendments there is provided a special machinery, but it is not machinery which, like that in the United States, impinges upon the Sovereign authority of Parliament. Thus Parliament is frankly constituent as well as legislative; and in no particular is its constituent authority more clearly emphasized than in the provision which specifically placed at its discretion the ultimate constitution and structure of the Upper House.

But, according to a high authority, there was another motive which inspired this interesting chapter of the Constitution. It was hoped by the leaders of South African opinion that after the lapse of a few years, when experience had been gained as to the working of the new centripetal institutions, and the advantages of union had been more generally recognized, 'provincial feeling would have so far given way to national feeling that it might be pos-

[1] It is a matter of controversy whether this statement can still stand. The Report of the Imperial Conference 1926 states that 'Great Britain and the Dominions . . . are . . . in no way subordinate one to another in any aspect of their domestic or external affairs', and the Imperial Parliament would appear *sub silentio* to have acquiesced in what General Hertzog is reputed to have described (in the South African Parliament on 16 March 1927) as a 'full abandonment of any claim [by Great Britain] to control or superior authority'. On the whole question cf. Marriott, ap. *Nineteenth Century and After* for September 1927, and Debate in House of Commons. *Official Report* for 29 June, 1927.

sible at the end of that time to make a nearer approach to the unitary principle.'[1] That hope has not, however, been entirely fulfilled.

The qualifications for Senatorship are five in number, and, with one exception, of the usual kind. A Senator must (i) be not less than thirty years of age; (ii) possess the qualification of a voter for the election of members of the House of Assembly in one of the provinces; (iii) have resided for five years within the Union; (iv) in the case of an elected Senator, possess real property of the net value of £500; and (v) be a British subject of European descent. The last-mentioned qualification strikes a note which resounds throughout the Instrument, and it was the note which aroused the severest criticism in the Imperial Parliament. It is no part of my purpose to re-argue this difficult question. Those who desire to see the case for the Constitution stated with sanity and restraint may be referred to the admirable treatise of Mr. R. H. Brand.[2] In his conclusions I entirely concur. It was a tempting and indeed a legitimate opportunity for the leaders of a certain section of British opinion. The protection of the 'native' population in British dominions throughout the world, is, in truth, the peculiar and cherished prerogative of Imperial Parliament. But even in the exercise of prerogative there must be some consistency. To make an immense and far-reaching concession of self-government, to confer upon a distant dependency the heaviest responsibilities, and to deny to its citizens the right to deal as they will in their wisdom, or even in their folly, with a question of vital and overwhelming importance, is surely the part, not of statesmanship, but of political ineptitude. The proper handling of the native problem is, as Mr. Brand says,

'a matter of life and death to the inhabitants of South Africa. They cannot be expected willingly to entrust it to those who have no immediate responsibility and who would not suffer in life or property from any mistakes they might make. It would

[1] R. H. Brand, *The Union of South Africa*, p. 68.
[2] *Op. cit.*, chap. x.

be like asking the British nation to submit its naval policy to the determination of South Africa. . . . The British Parliament might as well be restricted from legislating for women.'[1]

It may be repugnant to the canons of doctrinaire democracy to assent to a clause restricting membership of either House to 'men of European descent', but to have insisted on its deletion would have meant the postponement of Union in South Africa to the Greek Kalends. In view of the gravity and complexity of the problems with which South Africa is confronted—problems which a divided South Africa could not even face, and even a united South Africa may fail to solve, it will surely be held that the Imperial Parliament exhibited wisdom in declining to accept the responsibility of such postponement.

To return to the constitution, procedure, and functions of the Senate. The President is elected from among the Senators and has a casting vote. Otherwise questions are determined by a simple majority. Twelve members form a quorum. The Governor-General may dissolve the Senate simultaneously with the House of Assembly, or may dissolve the latter alone. But it is provided in the Act (§ 20) that the Senate shall not be dissolved within a period of ten years after the establishment of the Union, and that the dissolution shall not affect the nominated Senators. All Senators, like members of the House of Assembly, receive £400 a year, but forfeit £3 a day for every day of absence during the session. Each House has power to make rules and orders regulating its own procedure.

The relations of the two Houses are defined with precision. Money Bills must originate in the House of Assembly, but it is provided—

(1) That 'A Bill shall not be taken to appropriate revenue or moneys or to impose taxation by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties'; and (2) that 'Any Bill which appropriates revenue or moneys for the ordinary annual services shall deal only with such appropriation.'

[1] *Op. cit.*, p. 101.

The South African Senate can, like the Australian, reject, but cannot amend, a money Bill. As regards both money Bills and ordinary legislation the Senate possess only a suspensive veto. If a Bill passes the House of Assembly in two successive sessions, and is twice rejected by the Senate or receives at the hands of the Senate amendments to which the House will not agree, the Governor-General may, during the second session, convene a joint sitting, and the Bill, if then passed by a simple majority of the members of both Houses, shall be deemed to have been duly passed by Parliament, and may be presented for the Royal Assent. In the case of a money Bill the procedure is even more stringent; for the joint sitting may be convened during *the same session* in which the Senate 'rejects or fails to pass such Bill'.

The solution thus provided for a deadlock is generally similar to that of the Australian Commonwealth Act, but with this essential difference: The Australian Act provides for an appeal to the electorate; in the South African scheme there is no such provision. The difference between the two schemes may perhaps be connected with the more democratic character of the Australian Constitution, and still more directly with the fact that the South African Parliament, unlike the Australian, is competent to amend even the Constitution itself.

This competence is asserted in express terms in the Instrument itself. Section 152 declares: 'Parliament may by law repeal or alter any of the provisions of this Act, provided that no provision thereof for the operation of which a definite period of time is prescribed, shall during such period be repealed or altered.' Certain portions of the Act[1]—those dealing with the Constitution and election of the House of Assembly, and that relating to the equality of English and Dutch languages—cannot be repealed or altered except by a two-thirds majority in a joint sitting of the two Chambers.

It will be obvious from the foregoing paragraphs that the South African Constitution is, as might be anticipated

[1] §§ 33, 34, 35, 137.

from its unitary character, much closer to the English original than is that of Australia. Particularly is this true of the relations between the Legislature and the Executive. In Australia, as we have seen, there is considerable doubt whether the Cabinet system will prove to be compatible with federalism; whether the Executive is responsible to one or to both Houses of the Legislature. In South Africa there is no doubt as to the predominance of the Assembly; to it the Executive is responsible. The will of the Assembly, numbering one hundred and thirty-five members against forty Senators, can be made to prevail 'within the limits of a single Parliament', and, in the case of money Bills, within the limits of a single session. On the other hand, the Senate is in composition less democratic than that of Australia. Consisting partly of nominees, and partly of members elected by a process of double election, it has no such immediate touch with the people as the 'House of the States' in the Australian Commonwealth. What its precise place may ultimately prove to be in the working of the South African Constitution it is not possible to predict; time alone can tell. For much in the South African Instrument is left to the solvent of time. Its most striking characteristic is, indeed, as Mr. Brand well says, its trust in the future. And he proceeds:

'In other countries people and States have usually been most loath to part with one tittle of their independence or individuality, and constitutions have for the most part taken the form of very definite contracts of partnership, setting forth in precise language exactly what each partner surrenders and what he retains. The partners have generally been full of suspicion both of one another and of the new government which they were creating. There is little of this spirit in the South Africa Act. The people of South Africa are, in General Smut's words, called upon to pool their patriotism as well as their material resources. . . . The spirit of trust in the new government to be created is evident in every part of the Act. Its most striking manifestation is in the principle of the supremacy of Parliament; but it is apparent also in the willingness of the colonies to assent to the complete repeal of their present Con-

stitutions; in the power granted to Parliament to recreate the Senate in any form it likes at the end of ten years; in the determination to leave the supremely important question of the financial relations between the central government and the provinces to be settled by Parliament. The Constitution breathes also a new spirit of trust between the two dominant white races.'[1]

But enough of South Africa. One question still remains to be asked before we dismiss this portion of our subject. What conclusions, if any, can be drawn from the analysis of the legislative systems in the British Oversea Dominions?

One point emerges clearly. Despite experiences not uniformly encouraging, not one of the young Democracies has elected, in the final stage of its constitutional evolution, to discard the bicameral system. The Act which brought into being the federal Dominion of Canada was framed so immediately under the guidance of the Home Government that a departure from the traditional system would have been, under the circumstances, surprising. But neither in the case of the Australian Commonwealth nor in that of South Africa was the slightest pressure exerted in favour of a bicameral legislature. Australian statesmen were not ignorant of some inconveniences attaching to the system. Alike in New South Wales, where the Legislative Council is nominated, and Victoria, where it is elected, differences between the two Houses had been so frequent and acute as to bring the several Colonies to the verge of revolution. But this notwithstanding, the idea of a unicameral legislature for the Commonwealth was never for an instant seriously entertained. Australian democracy, it is clear, paid no heed to the dilemma on the horns of which France was for a time impaled. And as in Australia, so in South Africa. The provinces of the latter had, it is true, much less experience of the working of responsible government. But two out of the four provinces possessed (what Australia did not) experience of a single-chambered legislature. The secrets of the Durban and Capetown Conventions have

[1] Brand, pp. 114, 115.

not been revealed. It would be interesting to know whether the Transvaal or Orange State Delegates betrayed any hankerings after the system to which in the days of independence they were accustomed. If they did, the predilection was obviously not strong enough to prevail against the views of their colleagues from Cape Colony and Natal.

Another point deserves notice. An elected Second Chamber is not necessarily more democratic than a nominated body. On the contrary, some of the best Australian opinion tends to the conclusion that the nominated body is apt to be more sensible of the conventional restrictions upon the activity of a Second Chamber, in that it more closely approximates to the position of an hereditary House of Lords. On the other hand, it is beyond dispute that of all the Second Chambers in the Empire the one which is most closely in touch with a democratic electorate is, in many respects, the strongest.

A third point, worthy of observation, is the extreme care and elaboration with which both Australia and South Africa have provided for the adjustment of differences between the two Chambers. The machinery thus devised I have thought it advisable to describe in some detail, transcribing, as a rule, the *ipsissima verba* of the Instruments. These expedients are certainly interesting, and may perhaps, *mutatis mutandis*, be deemed applicable to other circumstances.

But between the Upper House of the Imperial Parliament and those of Germany, Switzerland, the United States, and the British Dominions oversea, there is this essential and fundamental difference: the former has its place in a unitary Constitution; the latter all stand for the federal principle in their respective Constitutions.[1] This broad distinction must necessarily, to some extent, vitiate comparisons. It will be well, therefore, to complete our survey of typical Second Chambers by a glance at the experiments of which France has been the fertile field.

[1] This is true even of the Senate in South Africa, though the Constitution itself is unitary.

X. THE FRENCH SENATE

'On trouve chez les Français, dans leurs relations avec l'Europe aussi bien que dans leur histoire intérieure, à côté de cet esprit de mesure et de ces sages tempéraments qui font les grandes politiques et les époques prospères, des bouffées d'ambition romanesque, une sorte d'ivresse conquérante, un goût capricieux de gloire et d'aventures. On reconnaît en eux avec cette modération dans la force, qui est la nature même du génie français, cet appétit de l'impossible qui en est le dérèglement.'—ALBERT SOREL.

MRS. BROWNING has rebuked Englishmen for calling the French light:

> 'The English have a scornful insular way
> Of calling the French light. The levity
> Is in the judgement only, which yet stands,
> For say a foolish thing but oft enough
> (And here 's the secret of a hundred creeds,
> Men get opinions as boys learn to spell,
> By iteration chiefly), the same thing
> Shall pass at last for absolutely wise,
> And not with fools exclusively. And so
> We say the French are light.'

To this charge English jurists are particularly obnoxious. The constitutional evolution of France offers contrasts so striking to the points on which we most pride ourselves, that it is not easy for Englishmen to avoid the tone, half contemptuous, half patronizing, to which Mrs. Browning, in common with French writers, not unjustly takes exception. But Professor A. V. Dicey,[1] writing of the rigidity of French Constitutions, suggested a more correct view.

'An English critic smiles at the labour wasted in France on the attempt to make immutable Constitutions which, on an average, have lasted about ten years apiece. . . . But the irony of Fate does not convict its victims of folly, and, if we look at the state of the world as it stood when France began her experiments in Constitution-making, there was nothing ridiculous in

[1] *The Law of the Constitution*, p. 474.

the idea that the fundamental laws of a country ought to be changed but slowly, or in the anticipation that the institutions of France would not require frequent alteration.'

English publicists in fact have special cause for gratitude to France, which for the last century and a quarter has provided for the students of political science a laboratory of constitutional experiments.

Down to the great revolution of 1789 the political development of France was orderly and logical in no common degree. Bishop Stubbs, indeed, finds in France the most perfect example of the 'logical career' of feudal government: disruptive aristocracy, administrative monarchy, democratic excess—each in turn prevailed. 'The constitutional history of France is thus', he says, 'the summation of the series of feudal development in a logical sequence which is indeed unparalleled in the history of any great State, but which is thoroughly in harmony with the national character, forming it and being formed by it.' [1]

But this orderly development was arrested by the explosion of 1789. Down to that year the States-General, when at long intervals it met, retained the original tricameral form—a form long since abandoned in England. It was, in truth, an assembly of the three Estates.

Since 1789 France has afforded an extraordinarily fertile soil for the cultivation of constitutional bacilli: the short-lived experiment of limited monarchy under the elder Bourbon line (1791); the unicameral Republic of 1793; the bicameral and Directorial Republic of 1795; the Consulate, with its tricameral legislature of 1799; the Napoleonic Empire of 1804; the Legitimist monarchy of 1814; the Napoleonic Restoration of 1815 with the Constitution amended under the *Acte Additionnel*; the Bourbon Restoration of 1815, under the *Constitutional Charter* of 1814; the Orleanist Charter of 1830; the Second Republic of 1848; the Second Empire of 1852, and finally the Third Republic of 1870, definitely established by a series of Constitutional

[1] *Constitutional History*, i. 4.

Laws passed in 1875.[1] Such are, in barest outline, the constitutional vicissitudes to which France has been exposed during the last one hundred and twenty years. It will be observed that the Constitution of 1875 has already attained a length of days unknown to any of its predecessors.

With the details of these Constitutions I must not permit myself to be concerned except in so far as they throw light upon the problem of the structure of the Legislature. But in this regard they are not less various than instructive.

The States-General under the ancient monarchy of France was, as we have seen, tricameral in structure: the three *Estates* voting separately *par ordre*. But by 1789 the most recent precedent was one hundred and seventy-five years old.

It was, therefore, natural enough that the question of procedure, whether votes should be taken *par ordre* or *par tête*, should have been hotly debated in the first days of the States-General convoked by Louis XVI in 1789. The Third Estate, after a moment's hesitation, invited the Nobles and Clergy to join them (June 10), and declared themselves (June 20) the *National Assembly*. The King, in the Royal Séance of June 23, dissolved the Assembly, and bade the three Orders deliberate and vote, in the ancient fashion, apart. Flagrant defiance of this order was the first overt act of revolution. Clergy and Nobles, or many of them, joined the Third Estate, and from the joint deliberations of this *Constituent Assembly* there issued the Constitution of 1791.

In the debates which preceded its promulgation, there was no question which exercised more acutely the mind of the Assembly than that of the form of the future Legislature. The *Comité de Constitution*, appointed on July 14 to draft the new Constitution, reported strongly in favour of a bicameral legislature on the English model. Mounier, the chairman of the Committee, cordially supported its

[1] Hélie, *Les Constitutions de la France*; Dicey, *Law of the Constitution*, appendix, note 1; Demombynes, *Les Constitutions européennes*, ii. 1–6; Joseph Barthélemy, *The Government of France* (Eng. trs.), c. v.

recommendation. But the Assembly would have none of it. Deeply imbued with the doctrinaire and unhistorical philosophy of Rousseau, unconvinced even by the recent example of America, and beguiled by the eloquence of Mirabeau, who for once was on the side of the doctrinaires, the Assembly decided by the overwhelming majority of 849 to 89 in favour of a single chamber. The mere fact that England adhered to the antiquated bicameral form was enough for many of the hot-heads of '89. But Mirabeau was no hot-head. He had, as has been said, 'the enthusiastic moderation, the fervent common sense which is the most rare and precious quality of genius, and which is especially valuable to the political reformer.' [1] He was against a Senate or a House of Peers, but he recoiled from the idea of the unchecked despotism of a single chamber and, in order to avert it, he fought desperately for the retention of the 'absolute veto' of the King.

'La nature des choses ne tournant pas nécessairement le choix de ces représentants vers les plus dignes, mais vers ceux que leur situation, leur fortune, et des circonstances particulières désignent comme pouvant faire le plus volontiers le sacrifice de leur temps à la chose publique, il résultera toujours, du choix de ces représentants du peuple, une espèce d'aristocratie de fait, qui, tendant sans cesse à acquérir une consistance légale, deviendra également hostile pour le monarque à qui elle voudra s'égaler, et pour le peuple qu'elle cherchera toujours à tenir dans l'abaissement.' [2]

But Mirabeau fought in vain. A merely 'suspensive veto' of the Crown, coupled with a single-chambered Legislature, consisting of 745 elected members, were cardinal features of the Constitution of 1791.

The *Legislative Assembly* lived only long enough to suspend the monarchy and to convoke a national convention, which met on September 21, 1792. The *Convention* having formally abolished the monarchy, and proclaimed a Republic, was presently delivered of the stillborn *Constitution*

[1] Willert, *Mirabeau*, p. 77.
[2] Mirabeau, *Speeches* (1 September, 1789).

of 1793. Under this Constitution, which never actually came into effect, the legislative function was to have been confided to a single chamber, annually elected by universal suffrage on the basis of one member for every 40,000 men. One check only was imposed upon the power of the Legislature. A right of protest was reserved to the people against any proposed law. Should a protest be raised the project was to be submitted to a referendum at the hands of the primary electoral assemblies. But these provisions never became operative, and, before it dispersed, the *Convention* had so far regained its sanity as to decree the *Constitution du 5 fructidor de l'an III.*

This Instrument, known as the Directorial Constitution of 1795, and justly described by Mr. Dicey as 'the most interesting among the French experiments in the art of constitution-making', provided for a Legislature of two Houses: the *Conseil des Cinq-Cents* and the *Conseil des Anciens*. Both Councils were elected by a process of double election, and one-third of each was renewed annually. The Cinq-Cents alone had the right to initiate legislation, the Anciens possessed only a right of veto. Constitutional amendments were not within the competence of the Legislature; they had to be promulgated by a special constituent assembly (Assemblée de révision), expressly summoned for the purpose, and had to be subsequently approved by the primary electoral assemblies. To these primary assemblies the Constitution de l'an III was itself submitted.

But already, within six years of its initiation, the single-chamber experiment, beloved of the doctrinaires, had been abandoned, and France, gradually returning to normal health after the wild orgies of the Revolution, declined any longer to be scared by the dilemma propounded by the most famous of her constitutional architects.

Never again, except for a brief space, under the Second Republic of 1848, did France renew the experiment.

The Directory offered the nearest approach to constitutional government enjoyed by France during the revolutionary period. But it was far from complete and

satisfying; still less was it permanent. As Thiers well said:

'Constitutional Government is a chimera at the conclusion of a Revolution such as that of France. It is not under shelter of legal authority that parties whose passions have been so violently excited can arrange themselves and repose; a more vigorous power is required to restrain them, to fuse their still burning elements, and protect them against foreign violence. That power is the Empire of the sword.'

The path for the Empire of the sword was cleared by the *Coup d'État* of the 18me Brumaire, and a few weeks later the Constitution of the year VIII (or *Consulate Constitution*) was promulgated. The Legislature, under this fantastic scheme, was not bicameral, but tricameral. It consisted of (i) a Senate of 80 members; (ii) a Tribunate of 100 members; and (iii) a *Corps Législatif* of 300 members. The Senators, who were to be not less than forty years of age, were irremovable. Fifty-six senators were in the first instance nominated by the Consuls; the remaining twenty-four were to be co-opted by the Senate itself from a list of seventy-two presented in equal proportions by the Tribunate, the *Corps Législatif*, and the First Consul. The Senate was charged with two duties: that of selecting (from a list of 5,000 sent up by the Departments) the members of the two other bodies; and that of vetoing any unconstitutional measures passed by them. The Tribunate consisted of 100 members, of not less than twenty-five years of age, nominated by the Senate, and renewable by fifths every five years. Its sole function was to discuss legislative projects, without voting upon them. The members of the *Corps Législatif*, likewise nominated by the Senate, had to be not less than thirty years of age, and were similarly renewable quinquennially. Their function was to vote, by ballot, on laws, without discussion, but after listening to a debate conducted by three members of the Tribunate and three members of the Council of State. To the latter body, which was primarily probouleutic, belonged the sole right of initiation.

Never was political ingenuity carried further in devising checks and balances, and never with less permanent result. Within two years the *Constitution de l'an VIII* was cut into ribbons by Napoleon, who became Consul for life, increased the numbers and functions of the Senate (now nominated largely by himself), and reduced the Tribunate to impotence. In 1804 the Consulate was transformed into an hereditary Empire, and to the Senate were added Princes of the Imperial family, great dignitaries of the Empire, and certain citizens nominated by the Emperor.

On the downfall of Napoleon, in April 1814, a new Constitution was promulgated by the Senate and *Corps Législatif*. It included the hereditary Monarchy and two Legislative Chambers, of which the Upper was to be nominated by the King and to be irremovable and hereditary. Louis XVIII, on his restoration, refused to endorse these arrangements, and issued in their place the *Constitutional Charter* of 1814. This Charter confided the legislative power to the King and two Chambers, but reserved to the former the sole initiative. The Chamber of Peers was to consist of an unlimited number of members sitting either by hereditary title or nominated for life by the King. It was to sit in secret; and, besides its legislative functions, was to act as a High Court of Justice, and in particular to decide impeachments preferred against Ministers by the Lower House. The return of Napoleon in 1815 was followed by the publication of the *Acte Additionnel*. This Act virtually re-established the Institutions in force before the overthrow of the Empire; but the sole initiative in legislation was reserved to the Emperor. The Senate was transformed into a Chamber of Peers composed of hereditary members selected by the Emperor. On the second restoration of the legitimate monarchy the charter of 1814 was resuscitated.

So matters rested until the bourgeois revolution of 1830. The Orleanist monarchy did little to amend the framework of the Constitution established in 1815. Louis-Philippe bestowed upon the Chambers a right of initiation concurrent with his own; the sessions of the Upper House were no

longer to be secret, and Peers were to be selected by the King only from certain definite categories, and were to be nominated only for life: it ceased, therefore, to be an hereditary body. One point, vital according to English ideas, was left indeterminate. Ministers were to be responsible; but to whom? Was the bourgeois monarch to sit upon 'a throne surrounded by republican institutions', according to the catchword of the Hôtel de Ville? Was Louis-Philippe to be a king who, according to the classic phrase of Thiers, 'reigned, but did not govern'? Or was he to be a king in the Bourbon sense? The point was not really decided during the whole of the Orleanist régime. Louis-Philippe himself was exceedingly tenacious of the control of the executive. 'They shall not', he was wont to say, 'prevent my driving my own carriage.' He proved to be singularly inexpert at the coachman's job.

In 1848 the Citizen Monarchy collapsed, and once again a Republic was proclaimed. A National Assembly elected by universal direct suffrage was convened by the provisional Government to draft yet another Constitution. The only feature in that Constitution which is of any importance in the present connexion was the structure of the Legislature. This was to consist of a single Chamber containing 750 paid members elected by the Departments and the Colonies by universal direct suffrage, and subject to dissolution every three years. The initiation of laws was shared between the Chamber and the President, who was further endowed with a suspensive veto. A special machinery was provided for the revision of the Constitution, but as the Constitution itself was overthrown by the Coup d'État of 2 December 1851 the details need not detain us.

Under the new Constitution promulgated by Louis Napoléon on 14 January 1852, the legislative power was confided to the President of the Republic and a bicameral Parliament. The Upper House, or Senate, was to consist of not more than 150 members, who were to include the Cardinals, Marshals, and Admirals of France, and a

certain number of citizens nominated for life by the Executive, i. e. the Prince-President. The functions of the Senate, which was to deliberate in secret, were exceptionally important.

The right of initiation was indeed vested in the President alone, but the Senate had a concurrent right of legislation, and in addition the quasi-judicial function of deciding, on appeal, the constitutionality of all laws. It had the further important right of issuing ordinances, subject only to the approval of the President, for the government of Algeria and the Colonies; for supplying any laches in the Constitution itself, and for deciding the interpretation of the Articles of the Constitution. Finally, the Senate alone had the right of proposing amendments to the Constitution. Such amendments, if approved by the President, were published in a *Senatus-Consultum*, and were then, if they affected the fundamental bases of the Constitution, submitted to a *plébiscite*.

The Decree of December 1852, which re-established the hereditary Empire, conferred upon the new Emperor the presidency of the Senate, and by diminishing the powers of the *Corps Législatif* enhanced those of the Senate.

During the last decade of the Second Empire various amendments were introduced by decree of the Senate. The two Chambers were instructed to vote an Address at the opening of each session in response to the speech from the throne, after the English manner; full and official reports of debates in both Houses were authorized; ministers without portfolio were specially appointed to recommend, in both Chambers, legislative projects, and both Chambers were endowed with the privilege of interpellating ministers. The Emperor further decided to share with both Chambers his right of initiating legislation; permitted the Senate to debate in public, and conferred upon both Chambers the exclusive right to determine their own rules of procedure.

The Franco-German War brought the Second Empire to the ground. MacMahon was defeated at Sedan on 1 Sep-

tember 1870, and on the following day Napoleon III surrendered himself and his army of 90,000 men to the King of Prussia. On 4 September the Republic was once more proclaimed. A Government of National Defence was hurriedly organized, and after the capitulation of Paris convened a National Assembly, which met at Bordeaux on 8 February 1871. This Assembly confirmed the dismissal of Napoleon III and his dynasty—a sentence already pronounced by *plébiscite*; entrusted the executive power to Thiers, and ultimately drafted the Republican Constitution of 1875, under which France is still governed.

The first Article of the new Constitution declares that 'the legislative power shall be exercised by two Assemblies: the Chamber of Deputies and the Senate'. It further declares that 'the composition, the method of election, and the powers of the Senate, shall be regulated by a special law'. Special laws were in fact enacted on 24 February and 2 August 1875 and 9 December 1884. To the detailed analysis of their provisions we may now proceed.

In the first place, we may observe that between the laws mentioned above there is a broad distinction: that of 24 February 1875 is a *Constitutional Law*, unalterable except by a special process; the other two are *Organic* or ordinary statutes, which, like any English statute, can be amended or repealed without recourse to special machinery. The only important amendment of the Constitutional Law was that effected by the Constitutional Act of 13 August 1884.

As regards the Senate, the general result is that its existence and powers rest on Constitutional Law; its Constitution only on Organic Law.[1]

The Senate consists of 314 members, the Chamber of Deputies of 580. Of the original 300 Senators 75 were elected for life by the National Assembly, and the remaining 225 by the Departments and Colonies of France. Under the revised law of 1884 all are now elected and serve for a term of nine years, one-third of the number retiring

[1] Burgess, *Political Science*, i. 97.

every three years.[1] The election is indirect, being vested in an electoral college in each Department and Colony, and is conducted by *scrutin de liste*. The College is composed of (1) the Deputies for the Department; (2) the Conseil Général (General Councillors of the Department); (3) the Arrondissement Councillors, and (4) Delegates elected from among the voters of the Commune by each municipal council. A Senator must be a French citizen; forty years of age; in the enjoyment of civil and political rights, and must (like a Deputy) have complied with the law regulating military service. Members of families which have reigned in France are ineligible for election. Senators, like Deputies, receive 45,000 francs a year for their services.

The Senate, conjointly with the Chamber of Deputies, elects the President of the Republic, who is 'responsible' to them only in case of high treason. In such a case he may be impeached by the Chamber of Deputies only, and must be tried by the Senate. The previous assent of the two Chambers is essential to the declaration of war. To the President belongs the negotiation and ratification of treaties, but he must give information regarding them to the Chambers, 'as soon as the interest and safety of the State permit'. Treaties of peace and commerce cannot be ratified until after they have been voted by the two Chambers. Apart from this measure of treaty-making power which it shares with the Chamber of Deputies, the Senate has one executive function which it shares with the President. Only with the advice of the Senate can the President dissolve the Chamber of Deputies before the legal expiration of its term. This prerogative attaching to the Senate is obviously one of immense importance. In a sense it puts the Executive at the mercy of the Second Chamber. There are parliamentary contingencies under which, as every Englishman knows, it is incumbent upon a Cabinet to appeal to the electorate for a fresh mandate. There are other contingencies, not more remote, under which it may be of supreme importance to a House of Commons to force

[1] M. de Marcière, the last of the life-Senators, died in 1918.

a dissolution upon the Cabinet. In France neither the Ministry nor the Chamber of Deputies possesses command of this most effective weapon. Nor, indeed, does the Senate. The Ministry can wield it, but only if it possesses the confidence of the Senate.

It may be well, at this point, to add that apart from the power thus confided to the Ministry in conjunction with the Senate, there is no provision in the Constitution for the solution of a deadlock between the two Houses.

The Senate may be constituted a Court of Justice to try either the President of the Republic or the Ministers on an Impeachment by the Chamber of Deputies; and it may be called upon by a decree of the President, issued in the Council of Ministers, to try persons accused of attempts upon the safety of the State. It acted thus in 1889 for the trial of Boulanger, Rochefort, and Dillon, and again in 1899 in the case of the Nationalist outrages. M. Yves Guyot declared that 'all Republicans consider that in these two instances the Senate rendered great service to the Republic, and greatly increased its own prestige'.[1]

In regard to ordinary legislation the Senate has concurrent power with the Chamber of Deputies to initiate, to amend, to pass, and to reject laws. In regard to money Bills the right of initiative belongs solely to the Deputies; the Senate has admittedly power of rejection, and has claimed and unquestionably has exercised the power of amendment, but not, it would seem, without protest from the Deputies. M. Yves Guyot reminds us that an attempt was made by Gambetta in 1882 to revise the powers of the Senate in this matter; but Gambetta was unsuccessful, and the generally accepted opinion of the best French jurists is that the Senate possesses the right of 'viewing, controlling, and examining' the budget.[2]

The rules governing the relations of the two Houses are at once exceedingly precise and entirely respectful to the Senate.

[1] *Contemporary Review*, No. 530, p. 152.
[2] M. Milliès Lacroix, quoted by Guyot, p. 145.

In regard only to one matter, but that a very important one, is there any ambiguity. To whom is the Ministry responsible? Article 6 of the Constitutional Law on the organization of the Public Powers (25 February 1875) declares: 'The Ministry shall be collectively responsible to the Chambers for the general policy of the Government, and individually for their personal acts.' Article 6 of the Law of 16 July 1875 enacts that 'the Ministers shall have entrance to both Chambers and shall be heard when they request it'. The law would seem to be explicit enough; but even in France convention is not without effect, and according to many jurists the tendency in unitary Parliamentary Constitutions to make the Executive responsible only to one Chamber has proved itself irresistible in France.[1] M. Yves Guyot argued vigorously in favour of the view that convention and law are in unison on this important point, and he writes with intimate personal knowledge of the facts, which he cites with overwhelming effect. 'On March 15, 1890,' he says, 'the Tirard Cabinet resigned on account of a vote passed by the Senate refusing to accept a treaty with Greece.' 'I was', he adds, 'a member of that Cabinet, and not one of us questioned the Senators' right. It is impossible for a Cabinet to govern in opposition to the Senate.' Again, on 20 April 1896 the Senate passed a vote of 'no confidence' in the Bourgeois Ministry. The Ministry paid no heed to the vote, and consequently on the following day 'the Senate refused to sanction credits for sending troops to Madagascar, thus forcing the Ministry to resign'. On at least half a dozen occasions the Ministries of the day appealed to the Senate for a vote of confidence. To what purpose, we may fairly ask, if the confidence of the Senate is unessential? In 1904 the Senate compelled the resignation of the Bourgeois Ministry, and that of the Briand Ministry in 1913.

The right of the Senate is, as we have seen, concurrent with and, except in regard to the initiation of money Bills,

[1] Esmein, *Éléments de droit constitutionnel français*; also Burgess and Lowell, *op. cit.*

equal to those of the Chamber. In one important respect the Senate is placed in a secondary position by reason merely of its numerical inferiority. I refer to the revision of the Constitution itself. Article 8 of the Constitutional Law of 25 February 1875 declares:

'*Article* 8. The Chambers shall have the right by separate resolutions, taken in each by an absolute majority of votes, either upon their own initiative or upon the request of the President of the Republic, to declare a revision of the constitutional laws necessary.

After each of the two Chambers shall have come to this decision they shall meet together in National Assembly to proceed with the revision.

The Acts effecting revision of the constitutional laws, in whole or in part, shall be passed by an absolute majority of the members composing the National Assembly.'

This machinery was actually set in motion for the purpose of amending the Constitution in 1879, when the seat of Government, fixed at Versailles in 1875, was transferred to Paris, and again in 1884, when important changes were effected in the position of the Senate.[1] Article 8, quoted above, does not, as will be seen, decide whether the Chambers are simply in general terms to declare the need for revision or whether they are to specify the nature of the amendment desired. This omission has given rise to lively debates. As a matter of fact, on two occasions when amendment was called for, the two Chambers passed identical resolutions specifying the articles which required revision. In this important matter the latest Constitution of France departs widely from precedent. For if there is one thing which more than another is a distinguishing characteristic of French Constitutions, it is the tendency to draw a sharp line of 'distinction between the constituent and legislative power, the former being withdrawn to a greater or less extent from the control of the Parliament'.[2] The Constitution of 1875 marks an entirely new departure, and has established in France a Parliament

[1] *Supra*, p. 145. [2] Lowell, i. 12.

almost as unquestionably sovereign as that of England. It must, however, be observed that before revision can even be entertained the assent of the Senate, no less than that of the Chamber of Deputies, is essential. Once in Joint Session, the Senators, it is true, can be outvoted; but except with the consent of a majority of their own number they can never be placed in such a situation.

It remains to consider the general position of the Senate in the working of the French Constitution. On this point there is a sharp conflict of opinion. M. Yves Guyot, in the interesting study already quoted, maintained that the personnel of the Senate is superior to that of the Chamber of Deputies, and that it has 'acquired a pre-eminence which it does not owe to the Constitution, but to the bad habits and weakness of those Deputies who theoretically should be most disposed to oppose it'. In support of his conclusion he pointed to the fact that, although a majority of the Cabinet Ministers must be Deputies, the Senate is apt to contain a far larger proportion of Ministers and ex-Ministers than the Chamber. The Senators are for the most part drawn from the professional classes, with a sprinkling of agriculturists. Few of them are either Monarchists or Socialists, the vast majority being staunch Republicans holding advanced radical but essentially individualist opinions. 'The greater number of men—not only ex-Ministers, but men who have any political reputation in Parliament—have sought', says Guyot, 'to migrate from the Palais Bourbon to the Luxembourg. The result is that the Chamber of Deputies has not ceased to suffer from a species of inverse selection.' This was a tendency by no means foreseen by the authors of the Constitution, but it is none the less indisputable. Mr. Lowell, though differing widely from M. Guyot as to the relative pre-eminence of the two Chambers, confirms his judgement of the personnel of the Senate. 'It contains at least as much political ability and experience as the other House, and, indeed, has as much dignity, and is composed of as impressive a body of men as can be found in any legislative

Chamber the world over.' Mr. Lowell admits, moreover, that the Senate 'does very valuable work in correcting the over-hasty legislation of the Chamber, and in case of disagreement often has its own way or effects a compromise'. But on the whole he insists that it is 'by far the weaker body of the two'. The point at issue is one on which it is peculiarly difficult for an Englishman to form a judgement, and still more hazardous for him to express it. Bryce, however, would seem in the main to support Mr. Lowell, holding that the powers of the Senate are weaker in fact than they seem on paper.[1] This view is in direct contradiction to Guyot, who contends that the Senate is far stronger in fact than in theory, and that its increasing influence is due to the timidity of the Deputies and their evasion of those legislative responsibilities imposed upon them by the Constitution. The Chamber, he insists, deliberately accept proposals which are both illusory and dangerous, in the confident hope and belief that they will be rejected by the Senate. 'It doesn't mean anything,' they explain in answer to remonstrance; 'don't attach any importance to it; the Senate will arrange all that.' That he declares is 'the consecrated sentence': 'The Senate will arrange all that.' Frequently they do, and all is well. Sometimes, on the other hand, the 'Senators become so conservative for themselves that they forget to be conservative of the principles and interests which they are expected to defend'. In the occasional exercise of mistimed caution, the French Senate is certainly not alone among the Second Chambers of the world. On the whole, however, it is an effective Second Chamber, and one of the latest commentators on the French Constitution, while admitting that the resistance of the Senate to certain factory reforms has aroused the rancour of the Socialist Party declares that there is no longer any real demand for its suppression. 'Republican opinion,' adds M. Joseph-Barthélemy, 'with regard to the institution of a Second Chamber, has undergone much the same evolution as took

[1] *Modern Democracies*, i. 264.

place in the mind of Gambetta himself; at first resigned with difficulty to the institution of a Senate, this great republican became after a few years its resolute and reasoned supporter. In 1882 he declared that the principle of two Chambers "is the guiding principle of all parliamentary government, and remains despite past errors the guiding principle of all democratic government".'[1]

Into the history of the Second Chamber in France I have entered in some detail, partly because the experiments tried in France have been exceptionally varied, and partly because France may be regarded as in some sort typical of the unitary States of modern Europe. But the variations afforded by the other States are sufficiently noteworthy to demand separate though summary investigation.

[1] *The Government of France*, p. 65.

XI. SOME SECOND CHAMBERS

'There is much reason to believe that the British House of Lords would have been exclusively or much more extensively copied in the Constitutions of the Continent, but for one remarkable difficulty. This is not in the least any dislike or distrust of the hereditary principle, but the extreme numerousness of the nobility in most continental societies, and the consequent difficulty of selecting a portion of them to be exclusively privileged.'—SIR HENRY MAINE.

'The necessity of a Second Chamber . . . has acquired almost the position of an axiom. . . . On the whole these Chambers in the continental Constitutions have worked well, though they have in general not yet had a very long experience, and most of them—especially those of a composite character—have included a large proportion of the chief elements of weight and ability in their respective countries.'—LECKY.

'. . . That the Second Chambers of the New Europe are not merely servile imitations of other Second Chambers already in existence is attributed by the fact that scarcely any two are alike.'—R. A. MACKAY.

TO estimate critically the working of the bicameral system in every European State would involve a discussion disproportionately lengthy, but for the purpose of reference and comparison I propose, in this chapter, to present in summary form those provisions of the chief continental Constitutions dealing with the composition and powers of the Second Chamber. I shall note in particular the competence of the Upper House in regard to money Bills; its control, where such exists, over the Executive; and the machinery, if any, for the solution of deadlocks between the two Houses.

The first point which emerges from this comparative study is that there is no Second Chamber in the world precisely similar to our own. For this Sir Henry Maine, as will be seen, suggested a curious and interesting reason. The divergence was originally due less to dislike or distrust of the hereditary principle than to the superabundance of the continental nobility. The fatal obstacle to the engrafting of a House of Lords on to the French Constitution of 1791 was the 'number and theoretical equality of the

nobles'. Siéyès calculated that France contained 110,000 noblemen, and Brittany alone 10,000. Maine himself points out that the combined Diet of the two small States of Mecklenberg-Schwerin and Mecklenberg-Strelitz consisted of 731 members, of whom 684 were persons of knightly rank, holding land by knightly tenure.[1] The principle of hereditary legislators, we are led to infer, owes its survival in England to the fact that we have only 'one fool in each family'.

Of all the continental Chambers, the three least unlike our own at the time (1910) when this book was first published were those of Prussia, Austria, and Hungary. All three have now been changed out of all recognition, and no longer demand or justify detailed description. But the reconstituted States, though two out of the three have declared for republicanism, have retained a bicameral structure for the Legislature. The Prussian Legislature consists of a Diet (*Landtag*) and a State Council (*Staatsrat*), the functions of which are roughly parallel with those of the *Reichsrat* in the Federal Constitution. The *Staatsrat* is elected by the fourteen Provincial Assemblies on the basis of one representative for every 50,000 inhabitants. Its primary function is to advise and control the Diet, and it has the right to reject legislation adopted by the latter.

Under the Constitution drafted by the Constituent Assembly of 1919, enacted 1 October 1920 and brought into operation 10 November 1920, Austria, reduced in area to 32,369 square miles and in population to 6,500,000, was declared to be a Federal Democratic Republic. Legislative power is partitioned between the Federation and the nine Provinces of which it is made up. The Federal Legislature consists of two Houses: a National Council elected, on the principle of proportional representation, by all adult citizens, and a Federal Council (*Bundesrat*). The latter consists at present of forty-six members, who are chosen by the Provincial Diets in proportion to their population, which varies from nearly 2,000,000 in the case of Vienna

[1] *Popular Government*, pp. 182–3.

to 140,000 in that of Vorarlberg. Vienna has twelve representatives and the other provinces are in proportion, with the proviso that none shall have less than three representatives. The chairmanship of the Federal Council passes every six months to each of the different Provinces in turn. The Assembly or National Council has exclusive jurisdiction in matters of finance and certain other enumerated matters, but otherwise the *Bundesrat* has the right to recommend, but not to insist upon, amendments. Particular articles of the Constitution can be amended only by a two-thirds majority of the National Council; total revision has to be approved by a Referendum. The Constitution also contains a provision for putting forward a demand for legislation by means of the device known as the 'Popular Initiative'. Any 200,000 voters, or half the voters of three Provinces, may demand the introduction of a Bill in the National Council. The popular initiative demand must, however, be expressed not in general terms (as it may be in Switzerland), but in the form of a draft bill.

The National Council and the Federal Council meet in joint assembly for the purpose of electing the President of the Federation and also for decisions as to the declaration of war. No provision is, however, made for determining deadlocks, as the functions of the Federal Council are merely advisory, and the will of the National Council must in all cases prevail. The Federal Ministers though responsible solely to the National Council must, if requested, attend the Federal Council and submit to interpellation and supply information.

The Hungarian Constitution has undergone relatively little change as a result of the war. The connexion with Austria has of course been severed, but after some two years of unrest and revolution Hungary has deliberately decided to re-establish the ancient Constitution, though the functions of the King are provisionally performed by a Regent. The Legislature still consists of two Houses, though the Upper House has been largely reorganized as a result of an Act passed 11 November 1926. The former

Upper House, the Table of Magnates, enjoyed the distinction of being the only Second Chamber in a great State whose numbers ever exceeded those of the English House of Lords. Formerly consisting of some 800 members, it had however been reduced to about 400.

The present House numbers even fewer, its members being distributed in six categories: (i) Some thirty-eight members who are elected by and from the hereditary members of the old Table of Magnates; (ii) about fifty members elected by the County Councils and Municipalities; (iii) the higher ecclesiastical dignitaries of the Roman Catholic and Greek Churches together with certain ecclesiastical and lay representatives of the Protestant Churches—about thirty in all; (iv) certain high officials, such as the Commander-in-Chief of the Army, the Governor of the National Bank, and the Judges of the High Court; (v) about forty members representative of chambers of commerce, scientific institutions, &c., and (vi) life members appointed by the head of the State. The Table of Magnates, it will be observed, combines the principles of hereditary right, official qualification, royal nomination, and secondary election. The powers of the Table of Magnates are in practice strictly subordinate to those of the Lower Chamber, to which ministers are exclusively responsible. Since 1848 there has been no provision for settling disputes between the two Houses.

The Spanish Cortes now consists of two legislative Chambers: the Senate, and the Congress of Deputies. The Senate is composed of (1) Senators in their own right, who include the sons of the King, and of the Heir-Presumptive to the Throne, on the attainment of their majority; Grandees of Spain in their own right who are not subjects of another Power, and have an ascertained yearly income of 60,000 pesetas derived from real property; the Captains-General of the Army and the Admiral of the Navy; the Patriarch of the Indies, and the Archbishops, and certain official members, namely, the President of the Council of State, of the Supreme Court, of the Court of Accounts of

the Kingdom, and of the Supreme Councils of War and of the Navy; (2) Life Senators appointed by the Crown; and (3) Senators elected by the corporations of the State and the larger taxpayers. The first two categories together are never to include more than 180 members; the third category must also number 180. Both life Senators and elected Senators must be selected from certain categories, such as: Ministers of the Crown; Bishops; Lieutenant-Generals of the Army; Vice-Admirals of the Navy; Ambassadors; Deputies who shall have belonged to three different Congresses, or have served during eight sessions; Presidents or Directors of the Royal Academies, &c. Under the law of 8 February 1877 the 180 Elected Senators are chosen as follows: (1) one by the Clergy of each of the nine Archbishoprics; (2) one by each of the six Royal Academies; (3) one by each of the ten Universities; (4) five by the Economic Societies of the friends of the Country, and (5) the remaining 150 by Electoral Colleges in each Province. These Colleges are composed of members of the Provincial deputations, and of representatives chosen from among the Municipal Councillors and largest taxpayers of the several towns and Municipal districts.

The composition of the Spanish Senate is of interest as approximating more nearly perhaps than any other Second Chamber in Europe to the proposals for a reconstituted House of Lords put forward by various reformers in this country. The powers of the Senate and the Congress of Deputies are strictly co-ordinate; but laws relating to taxation and to the public credit must in the first instance be presented in the Congress of Deputies. If either House rejects a Bill, or if the King refuses his sanction thereto, no other Bill upon the same subject may be introduced in that session. Ministers can speak in both Houses, but vote only in that to which they belong. The King has power to dissolve either simultaneously or separately the elective part of the Senate and the Congress of Deputies. Bills commenced in one session may be taken up again in the next if no dissolution has intervened.

The Italian Senate consists exclusively, apart from Princes of the Blood Royal, of members nominated by the King for life; these members, of whom there are now 393, must be nominated from 21 categories of notables; but there is no limit of numbers. The categories include: Archbishops and Bishops; Deputies who have served in three legislatures, or for not less than six years; Ministers of State; Ambassadors; various Judges and Law officers; General officers of the Land and Naval Forces; Members of the Royal Academy of Science of seven years' standing, and any persons who by their services or eminent merit have done honour to their country, or who for at least three years have paid direct property or business taxes to the amount of 3,000 lire. Senators, like Deputies, receive 15,000 lire a year and are entitled to travel gratis on the railways. The Cabinet as a whole is responsible only to the Lower House, though there have been occasions on which a minister has resigned in consequence of an adverse vote in the Senate. But the general subordination of the latter body is amply secured by the fact that the Crown has power to create Senators in unlimited numbers. Not infrequently this power has been used in a dramatic fashion to alter the political complexion of the Upper House: thus in 1886, 41 Senators were appointed in a single batch; in 1892, 42; and in 1890, as many as 75.[1] The Senatorial power of amendment is freely exercised, but according to Dupriez[2] the amendments have usually a legal, rather than a political importance. Apart from its legislative functions, the Senate may be constituted a High Court of Justice by decree of the King to try crimes of high treason and attempts upon the safety of the State, and to try ministers impeached by the House of Deputies. Senators, like English Peers, can be tried only by the Senate. As regards legislation, it is provided that all Bills shall, in the first instance, be submitted for preliminary examination to committees elected by each House. The Houses have equal rights of initiation, and no Bill rejected by either House or

[1] Lowell, ii. 156.

[2] *ap.* Lowell, ii. 156.

vetoed by the King can again be introduced during the same session. Ministers may be heard in either House; but cannot vote unless they are members.

The Constitution of Portugal was until 1910 based upon the Constitutional Charter of 1826, amended in 1852, 1885, and 1896, and possessed, therefore, a special interest for English students as having been avowedly modelled upon that of England. It must, however, be confessed that the institutions thus transported did not thrive too well upon alien soil, and the Constitution was completely remodelled in 1911. Portugal was then declared a republic. The Legislature is composed of two Houses. The Second or Upper Chamber consists of 71 members, who are elected for three years by the Municipal Councils; but only half the members retire at one time.

The Second Chamber of the Netherlands, known in that country as the First, is commonly regarded as constitutionally the least powerful of any Second Chamber in Europe. It was made elective when the Constitution was revised in 1848, and now consists of fifty members elected from among the largest taxpayers by the Provincial Estates for a period of six years, half of them retiring by rotation every three years. The entire initiative of legislation, both general and financial, belongs to the Lower House; the Upper House has the power of rejection, but no power of amendment. The Heads of the Ministerial Departments have seats in both Houses; but unless they have been elected to the House in which they sit they have only a deliberative voice. Much of the work of the States-General is done in joint sessions of the two Houses, but the power of the Upper House when sitting alone is reduced to a minimum.

The Belgian Senate is composed of: (1) Members elected according to the population of each Province for a term of four years; (2) Members elected by the Provincial Councils, on the basis of one for every 200,000 inhabitants, with a minimum of three Senators for each Province. Of these Senators there are now forty. The number of Senators

elected directly by the voters must be equal to one-half the number of Members of the House of Representatives, and like the latter are elected by universal suffrage exercised on the principle (since 1899) of proportional representation. As a rule half the Senators retire every four years; but the Senate, like the House of Representatives, may be dissolved, and in that case is renewed *en bloc*. All elected Senators must be at least forty years of age, and receive 4,000 francs per annum. In addition to the elected Senators, Princes of the Blood become Senators by right at the age of eighteen, but have no vote until they reach the age of twenty-five. Ministers may sit in either House, and may be heard in either House whether they are members of it or not.

In Denmark the Rigsdag consists of two Houses: the Landsting, and the Folketing. The former consists of seventy-six members, of whom nineteen are elected by the former Landsting; one in the Faroe Islands, and the remaining fifty-six by the six Landsting's districts into which the country is divided. They are elected by a process of double election by Folketing voters of over thirty-five years of age, and in every case on the principle of proportional representation. Members of the Landsting serve for eight years and are paid at the same rate as members of the Folketing. Ministers can speak and sit in either Chamber, but vote only in that of which they are members.

The Swedish Legislature down to 1866 retained its original form of four Houses representing the four Estates; but by the Amendment of 1866 a bicameral legislature was adopted and was confirmed by the amendments of 1909–25. The Upper House consists of 150 members elected, for a term of eight years, by the Provincial Assemblies and by the electors of six Municipal Councils of the larger towns. There are nineteen constituencies distributed in eight groups, in one of which an election takes place every year. No one is eligible for election to the Upper House who is not at least thirty-five years of age and has not possessed, for a period of at least three years previous to

the election, real property of the taxable value of 50,000 kroner (nearly £3,000), or an annual income of at least 3,000 kroner. The two Houses have equal authority in regard to legislation, which is under the general direction of a joint Committee of both Houses. In the event of a disagreement on financial matters, a decision is reached in joint session; each House votes separately upon the matter in dispute, but the opinion which receives the majority of votes of the two Houses is deemed to be the decision of the Riksdag.

The position of Norway is, as regards its Legislature, ambiguous. Jurists are not agreed as to whether it is to be classed among unicameral or bicameral constitutions. In the view of some publicists, Professor Lees Smith and Professor Sidney Webb, for example, it is bicameral. 'By far the best way of forming a Second Chamber in this country', wrote the latter (1917), 'would be the Norwegian system.' 'The Second Chamber in Norway', writes the former, 'is of special interest.'[1] It is certainly of interest in that it appears to be the system which commends itself to the *intelligentsia* of the English Socialist Party. As such it deserves analysis.

Entire legislative power is vested in a body of 150 representatives, who are elected triennially to form the *Storting*. Article 73 of the Constitution of 1814 provides that the Storting shall select one-fourth of its members to constitute the Lagting. After such selection, which must take place at the first regular session of the Storting after a

[1] Mr. Lees Smith would seem, however, to be mistaken in stating that 'the principles upon which it is based . . . were included by the Bryce Conference in their *proposals* for this country'. As I was myself a member of the 'Conference', I am able to say that the Norwegian system was, like every other, considered by us, and my recollection is that it was warmly advocated by one member of the Conference. But the proposals which we finally made for the reconstruction of the English Second Chamber were widely different from the Norwegian system, and resembled it only in so far that members of the House of Commons *locally grouped* (an important distinction) were suggested as electors for the Second Chamber. The suggestion was, I fear, only a *pis aller* at the moment, and has found little support.

general election, the two Houses deliberate apart. The sole right of initiating legislation belongs to the Lower House, or Odelsting; the Lagting may either approve or reject a Bill; if rejected it must be returned with the objections urged against it to the Odelsting; the latter has then the alternative of dropping the Bill, or sending it up again to the Lagting with or without amendment; should the Lagting reject a Bill sent up by the Odelsting a second time, the whole Storting meets in joint session and decides the question by a two-thirds vote. The Lagting constitutes, in conjunction with the Supreme Court of Justice, the *Rigsret*, a tribunal before which members of the Executive, Legislature, or Judiciary can be impeached. All Bills involving questions of finance, public works, naturalization, and motions criticizing the action of Ministers are by rule brought before the whole Storting, when they are decided by a bare majority of votes. It is evident that the Lagting performs some of the functions of a Second Chamber; but its members possess no differentiating qualifications: they are selected from and by the Storting, and do not sit by virtue of any independent right conferred either by the electorate, or by official nomination, or by hereditary privilege. The Lagting is, in fine, not a Second Chamber, but merely a revising Committee of the Single Chamber. The King has the right of rejecting Bills passed by the Storting; but if a Bill is passed without amendment by three Stortings convened after three separate and successive elections, it becomes law even without the approval of the King. Ministers are appointed by the King, but hold office only so long as they retain the confidence of the Storting, of which, however, they may not be members, though they speak in it.

There now remain to be considered only the Second Chambers of the recently constituted States in Europe and of those which during or since the Great War have undergone revolutionary changes. Among the latter we may first notice Russia. Prior to 1906 Russia was an autocracy, but, according to the Constitution of 1906, the power of

legislation was vested jointly in the Emperor, the Council of the Empire, and the Imperial Duma. In regard to fundamental or constitutional laws, the sole right of initiation was reserved to the Emperor; ordinary legislation either House had the right to initiate. The Council of the Empire, or Upper House, consisted partly of members nominated by the Emperor, and partly of members chosen by election; but it was provided that the Imperial nominees must not exceed the number of elected members. The latter were chosen as follows: 6 by the Clergy of the Greek Orthodox Church; 1 by each of the Provincial Zemstvos; 18 by the Assemblies of the Nobility; 6 by the Imperial Academy of Science and the Imperial Universities; 12 by the Council of Trade and Commerce, together with the Local Committees of Commerce and Boards of Trade. In each case the election was indirect and was in the hands of Electoral Colleges for each of the five classes of electors. The elected Members of the Council of the Empire sat for nine years, but one-third of each class retired every third year. In matters of legislation the Council of the Empire and the Imperial Duma enjoyed concurrent rights. Both Houses had the right to demand explanations from the ministers, and from the Heads of Independent Departments; but such ministers might vote in the Councils of the Empire and in the Imperial Duma only if they were members of those bodies respectively.

This Constitution, never too robust, collapsed under the strain of war; the Czar's Government was overthrown in March 1917 and a Provisional Government was set up by the Duma under Prince George Lvov. Ministry followed Ministry, until in November a *coup d'État* was carried out by the Bolshevik Socialist Party, who set up a military revolutionary committee. An All-Russian Congress of Soviets—councils of workers, soldiers, and peasants—was immediately summoned and drafted a Constitution which was ratified at a subsequent Congress in July 1918. Its terms were further modified (1920–4), and will doubtless be amended again, but its distinctive features have remained

constant throughout. At the base of the whole structure is the Council or Soviet of the town, village, or factory, and upon that base is erected a series of Councils, each of which forms an electoral college for the Council immediately above it, until we reach at last the Union Congress of Soviets, in which supreme and ultimate authority is vested. Consisting of more than 1,500 members, and meeting only once a year, its powers are for the most part delegated to and exercised by a Union Central Executive Committee. This Committee meets for a fortnightly session every four months, and consists of two Chambers: (i) The Union Council of 414 members, elected for the six Constituent Soviet Republics, on the principle of proportional representation, by the Congress of Soviets; and (ii) the Council of Nationalities of 100 members, made up of five members for each of the six independent Republics and one for each autonomous district. The Executive Committee, in its turn, delegates its authority, legislative and executive, to a Praesidium of twenty-seven members, nine from each Chamber and nine elected at a joint meeting. The actual government is vested, however, in the Union Council of People's Commissaires, composed of a President, five Vice-Presidents, and nine heads of Administrative Departments.

The main justification for a brief description, in this place, of a Constitution which may or may not be transitional, is the fact that even the Union of Soviet Socialist Republics (to employ the official designation) has not discarded the bicameral principle: the assent of both Chambers is necessary for all legislation.

None of the pre-war States of Europe have undergone more striking, not to say melodramatic, transformation than Turkey. With the transference of its capital to Angora and the abolition of the Sultanate and the Caliphate, the Ottoman Empire and Turkey-in-Europe have virtually ceased to exist. In a sense, the Ottoman Empire was never more than accidentally European. The transference of the capital to Asiatic soil is a reversion to type,

and the resumption of traditions which were never entirely broken. Nevertheless, the transformation is as startling as it is complete.

Turkey was, under the Constitution of 10 April 1924, declared to be a Republic, and sovereignty was declared to reside in the people, while authority, legislative and administrative, was vested in the Grand National Assembly as the sole lawful representative of the nation. The Republican form is declared to be fundamental and unalterable.

The Assembly exercises legislative power directly, and delegates executive authority to the President of the Republic, who chooses the Prime Minister. The Judicial power also is exercised in the name of the Assembly, though the independence of the Judiciary is specifically asserted.

The President is elected by the Assembly from among its members for the duration of the Parliament, and is re-eligible. During his term of office he may not speak or vote in Parliament. He nominates the Prime Minister from among the Deputies, and the latter chooses his colleagues from the same body. The Ministers are collectively and individually responsible to Parliament.

All this, however, is 'common form' to modern democracies. The distinctive feature of the new Turkish Constitution is the absence of a Senate or Second Chamber. The Constitution of 1909 did, on the contrary, provide for a Senate, to be nominated from certain categories by the Sultan. A subsequent amendment introduced Elective Senators (as to one-third of the Senate), but even this modification failed to commend the bicameral system to the architects of the new Constitution.

In adherence to the principle of single-chamber legislature the new Turkey is not alone among the States of Eastern Europe—Bulgaria, Jugo-Slavia, Esthonia, Latvia, and Lithuania have all adopted the same model. Some of the post-war States have barely 'got into their stride', and the time has not yet come for detailed criticism, or even

analysis, of the new Constitutions with which they have enriched the political laboratory. A brief enumeration may therefore suffice.

Greece abolished the monarchy in 1924, and declared itself a Republic, and in 1926 promulgated a new Constitution. Having vacillated for nearly a century between unicameralism and bicameralism, it has in the latest of its Constitutions provided for a Senate of 150 members, who, like the members of the Lower House, are to be elected, on a system of proportional representation, by direct and universal suffrage. How the system will work it is premature to predict.

Roumania, which adopted a revised constitution in 1923, provided for a Senate on a quasi-federal basis. Of the 170 elected members, 82 represent the old kingdom, 45 Transylvania, 24 Bessarabia, and 19 the Bukovina. The Heir to the Throne also has a seat in the Senate, and there are a few Life-Senators, selected from among ex-Premiers, ex-Commanders-in-Chief, and ex-Presidents of the High Court.

Even little Albania has its Senate of 18 members, of whom 12 are elected and 6 are nominated.

The Egyptian Constitution of 1923 provided for a bicameral legislature: a Chamber of Deputies elected by universal suffrage for five years, and a Senate, of which three-fifths are elected on the same franchise as the Chamber and two-fifths are nominated by the King—in each case for ten years; one-half of both categories being renewed every five years.

In Poland both Chambers are elected by universal suffrage on a proportional basis.

The Czecho-Slovakian Constitution (adopted 20 November 1920) possesses several significant features. It vests the legislative power in a National Assembly composed of two Chambers: a Chamber of Deputies and a Senate. The Chamber is composed of 300 members, elected by universal, equal, direct, and secret suffrage on the principle of proportional representation for a term of six years. The Senate consists of 150 members similarly elected for eight

years: but both Chambers may be dissolved by the President. Members of the Senate must be forty-five years of age; of the Chamber thirty, and both sexes are equally eligible. Constitutional amendments require the assent of a three-fifths majority in each Chamber. The President is elected in a joint session of both Chambers. Ordinary legislation can be initiated in either Chamber, except in the case of Budget and National Defence Laws which must originate in the Lower House. The Senate must come to a decision on the latter within one month and on other Bills originating in the Lower House within six weeks. The Chamber of Deputies has a longer period—three months—allowed for deliberation, but failing such a decision in either case the Bill becomes law. A Bill rejected by the Senate becomes law if, by a majority of the whole House, the Deputies insist upon it, unless the Senate has rejected it by a majority of three-fourths, in which case three-fifths of the Deputies are required to secure its enactment.

A Bill initiated by the Senate and rejected by the Chamber, and reaffirmed by an absolute majority of the Senate, cannot become law if it is a second time rejected by the Chamber by an absolute majority. Government Bills rejected by the National Assembly may (except in the case of Constitutional amendments) be submitted to a Referendum. The President possesses a suspensive veto, of one month's duration, upon all Bills, but a Bill reaffirmed by an absolute majority in both Chambers or by a three-fifths majority of Deputies becomes law without his assent. Article 41 of the Constitution contains the exceedingly salutary provision that every proposal for legislation presented by a member of either Chamber must be accompanied by an estimate of its financial effect, together with a proposal for defraying the expenses involved. Such a precaution, if adopted in our own Parliament, would probably have done more to impose a check upon national expenditure than any other device known to our Constitution. Another article forbids members of either House to

'receive instructions from any person whatsoever, or to address to public authorities requests in the personal interests of individuals unless they do so in the exercise of their ordinary profession'. How light must be the post-bags of Czecho-Slovakian members of Parliament!

Passing to the Western Hemisphere, we find the model afforded by the United States widely, and naturally, prevalent. Mexico has an elected Senate of fifty-eight members, two to represent each State. In Chile each of the principal groups, nine in number, elect five Senators for a term of eight years, half the number retiring every four years. The Argentine Republic has a Senate of thirty members, two representing the Capital and two elected from each of the fourteen Provinces. The Senators for Buenos Aires are elected by a special electoral college, the rest by their respective Provincial legislatures, in each case for nine years, though one-third of the number retire every three years. The Senate in Brazil is similarly constituted, save that the Senators, sixty-three in number, three for each State, are directly elected. Bolivia and Venezuela follow the example of Brazil, but in Uruguay the Senators are elected by an electoral college.

Turning from America to Asia we must notice a Second Chamber which is of peculiar interest to Englishmen. The Japanese Legislature consists of two Houses: a House of Representatives and a House of Peers. The House of Peers is made up of no fewer than six different categories: (i) adult male members of the Imperial Family, who now number 19; (ii) princes (15) and marquises (31) of not less than thirty years of age; (iii) counts (18), viscounts, (66) and barons (66), elected from and by their respective orders of nobility; (iv) a number of persons, not exceeding 125, nominated by the Emperor for distinguished service to the State, or as being eminent in learning; (v) 4 members of the Imperial Academy of Science, elected by that body; and (vi) 66 persons elected to represent in each district the highest taxpayers. The elected members serve for seven years and all must be at least thirty years of age.

The House of Peers at present numbers a total of 399 persons. The powers of the two Houses are co-ordinate, as regards both initiation and veto, as well in matters of finance as in ordinary legislation. The elected and nominated members of the House of Peers receive the same salary (3,000 yen and travelling expenses) as members of the House of Representatives.

Finally, it remains to notice two Senates which have lately been set up, directly or indirectly by the Imperial Parliament, in Ireland.

In 1922 an Act, known as *The Irish Free State (Agreement) Act*, was passed by the Imperial Parliament to give force of Law to certain Articles of Agreement for a Treaty between Great Britain and Ireland, which had been signed at midnight on 6 December 1921 by Mr. Lloyd George, Lord Birkenhead, Sir Austen Chamberlain, and others of the one part, and Mr. Arthur Griffith, Mr. Michael Collins, and others of the other part.[1]

It was therein agreed that Ireland should have the same constitutional status in the British Empire as Canada and the other Great Dominions. A Provisional Government was to be constituted for a period not exceeding twelve months. The Provisional Parliament drafted a Constitution for the Irish Free State, and this Constitution, embodied in an Act of the Imperial Parliament (13 Geo. V, c. 1), received the Royal Assent on 5 December 1922.

The Legislature was to consist of the King and two Houses—a Chamber of Deputies and a Senate. The Senate numbers sixty members, one-fourth of whom are to be elected from a panel selected by the two Houses on the principle of proportional representation by the Irish Free State organized as a single constituency. Of the first Senate half the members were elected by Dáil Eireann (the Chamber of Deputies); the other half were nominated by the President of the Executive Council. In future, however, all members will be elected in the manner aforesaid. All members must be qualified for membership of

[1] 12 Geo. V, c. 4.

Dáil Eireann and have reached the age of thirty-five. Candidates are to be selected 'on the grounds that they have done honour to the Nation by reason of useful public service or that, because of special qualifications or attainments, they represent important aspects of the nation's life'. The nominated members of the first Senate were honourably selected in accordance with this Article (§ 37) of the Constitution, and the Sénate has thus far amply justified its existence. The Chamber of Deputies possesses exclusive control over Money Bills, but a Money Bill is carefully defined in the Constitution (§ 35) as 'a Bill which contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alleviation, or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on public moneys or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; subordinate matters incidental to those subjects or any of them'. To the Chairman of the Chamber is assigned the duty of certifying a Money Bill, but two-fifths of *either House* may demand an appeal against his decision, which is to be decided by a Committee of Privileges, consisting of three members of each House, with a Chairman who shall be 'the Senior Judge of the Supreme Court able and willing to act', who shall have a casting vote. Appropriations of money must in all cases be recommended by the Crown.

In regard to Money Bills, the Senate may make 'recommendations', which must be sent back to Dáil Eireann within twenty-one days, and may be either rejected or accepted by the latter.

Ordinary Bills may be initiated in either House. Bills introduced into Dáil Eireann may be amended by the Senate. In case of disagreement between the two Houses a joint sitting may be held for the purpose of debating, but not voting upon the points in dispute. The Dáil, however, has the last word.

As a fact many Bills have been amended, in important particulars, by the Senate, which contains men of experience in those departments of public life which find little or no representation in the Dáil. In those cases, relatively few, in which the Dáil has refused to accept amendments proposed by the Senate, the latter has, thus far, gracefully withdrawn, the general feeling being that no case has yet arisen in which it was worth while to exercise the power of postponing legislation for nine months, or even of calling for the joint session prescribed or permitted by the Constitution.

Whether this comfortable and peaceful state of affairs will continue it would be rash to prophesy: but it is easy to imagine, if not wise to anticipate, a condition of parties in the Dáil which would give the Senate a position of considerable though not commanding influence.

Northern Ireland, consisting of six counties and the county-boroughs of Belfast and Londonderry, was permitted, under Article 12 of *The Irish Free State* (*Agreement*) *Act*, to contract out of the Irish Free State, and promptly availed itself of the permission. It thus came under the provisions of *The Government of Ireland Act* (1920), as amended by *The Irish Free State* (*Consequential Provisions*) *Act* of 1922. Under these Acts a separate Executive and Legislature have been established in Northern Ireland. The Legislature consists of two Houses: a House of Commons of fifty-two elected members and a Senate. In addition Northern Ireland continues to be represented in the Imperial Parliament by thirteen members. The Senate consists of two *ex officio* members, the Lord Mayors of Belfast and Londonderry, and twenty-four other persons elected by the members of the House of Commons.

Half the members of the Senate, chosen by lot, retired under the Constitution after the expiry of four years from its inception and their places were filled by proportional representation The Socialist minority obtained representation, and the Nationalist minority might have

obtained it also had they taken the trouble to organize. Both these parties profess to disapprove on principle of the Senate as an institution, but there is no serious demand for its reform or abolition.

Money Bills must originate in the House of Commons and may not be amended by the Senate. As regards other Bills the Senate possesses a suspensive veto, but if it persists in rejection or amendment for more than one session the Governor may, during the second session, convene a joint session of the two Houses, and a Bill may then be carried by a simple majority. The same procedure is prescribed for Money Bills, save that in the case of a Money Bill rejected by the Senate the joint sitting may be held in the same session in which the Bill was first rejected by the Senate.

These provisions have thus far (1927) worked smoothly, and the Senate has performed its functions to general satisfaction. Several useful measures initiated in the Senate have found their way on to the Statute Book, and the Senate has also used freely its power of amendment without coming into collision with the House of Commons.

Ministers are allowed to speak in either House, but not to vote, and have not infrequently availed themselves of the permission. Ministers, who are members of the House of Commons, have introduced several important Bills in the Senate, and in at least one instance a Senator-Minister has introduced a Bill in the Commons.

This brief sketch will suffice to demonstrate the variety of types presented by Second Chambers. Not less apparent is the difficulty which the framers of artificial Senates have encountered in discovering a basic principle which shall be at once sound, intelligible, and differentiating. The hereditary principle—as the exclusive basis for the composition of a Second Chamber—has been everywhere abandoned. Hungary, Spain, and Japan retain a remnant of it. The nominee system, pure and simple, has been adopted in Italy, Portugal, New South Wales, Nova Scotia, Newfoundland, Quebec, and the Canadian Dominion; and in

part in other cases; the elective system *sans phrase* in France, Belgium, the Netherlands, Sweden, Greece, Denmark, Norway, the Australian Commonwealth and the Australian States (except New South Wales and, of course, Queensland), the United States of America, and the South American Republics. Several Upper Houses, such as those of Spain, New Zealand, and Roumania, combine the elective principle with one or both of the others.

In the States which have adopted frankly and exclusively the elective principle the difficulty has been to differentiate the Second Chamber from the First. This notwithstanding, Mr. Henry Sidgwick expressed a distinct preference for this type, if it is desired to obtain a co-ordinate authority.

'A Second Chamber in order to be able to maintain a really co-ordinate position against the pressure of a popularly elected assembly must itself be also in some way, though perhaps indirectly, the result of popular election.' [1]

But if this method be adopted a further precaution is, according to the same writer, indispensable.

'In order to get the full advantages of the system of two Chambers, with co-ordinate powers, it seems desirable that they should be elected on different plans, in respect both of extent of renewal and of duration of powers; so that while the primary representative Chamber being chosen all at once for a comparatively short period may more freshly represent the opinions and sentiments of the majority of the electorate, the Senate, elected for a considerably longer period, and on the system of partial renewal, may be able to withstand the influence of any transient gust of popular passion or sentiment.' [2]

Any one who has followed with attention the foregoing pages will have perceived that this precaution has not been neglected by the framers of modern Constitutions. Elective Second Chambers are, as a rule, differentiated from the First in one or more of the following ways: (1) Indirect or secondary election—a device adopted, for example, in France and the Netherlands; (2) a difference in the length

[1] *Elements of Politics*, p. 474. [2] *Op. cit.* 475–6.

of the period for which election is made; thus in France a Senator is elected for nine years; a Deputy only for four; in the United States the terms are six years and two respectively; (3) 'continuous existence': secured by the device of partial periodic renewal—a device almost universally adopted; and (4) a differentiation in the electoral area or in the mode of election, or both. Thus, in the Australian Commonwealth Senators are elected by *scrutin de liste*, and the electoral unit is the whole State.

These and similar devices are beyond all question the refuge of constitutional jurists convinced that a strong Second Chamber is indispensable, but confronted by the obvious fact that nominee Chambers have lent themselves too readily to party convenience, and compelled by the absence of a genuine aristocracy or by the domination of democratic formulae to base their Senates upon the elective principle. Moreover, all the Upper Chambers whose composition we have analysed are, with the exception of that of Hungary, modern and manufactured. Some of them, like those of Sweden and the United States, have history behind them, and may be regarded as the products of evolution rather than of revolution. But in no case, always excepting Hungary, have historical traditions played any important part in the moulding of modern institutions. It is wholly different in the case of the one really historical Second Chamber in the world. To a consideration of the present and future position of the House of Lords we shall return.

XII. THE PARLIAMENT ACT AND AFTER

'The differences, not of a temporary or casual nature merely, but differences of principle, differences of prepossession, differences of mental habit, and differences of fundamental tendency, between the House of Lords and the House of Commons, appear to have reached a development in the present year such as to create a state of things of which we are compelled to say that in our judgement it cannot continue. . . . The issue which is raised . . . is a controversy which when once raised must go forward to an issue.'—W. E. GLADSTONE (1894).

'In order to give effect to the will of the people as expressed by their elected representatives, it is necessary that the power of the other House to alter or reject Bills should be so restrained by law as to secure that within the limits of a single Parliament the final decision of the Commons shall prevail.'—*Resolution of the House of Commons* (1907).

THE first of the passages prefixed to this chapter is extracted from Mr. Gladstone's last speech in the House of Commons. Exasperated by the rejection of his Second Home Rule Bill in 1893, and by the emasculation of the Employers Liability Bill in 1894, the old statesman was moved to make a vigorous assault upon the co-ordinate legislative authority of the Second Chamber. Some Radical politicians had long looked forward to a trial of strength between the two Houses. Many more regarded Gladstone's words as a testament bequeathed to the Liberal Party which it was their pious duty to execute. But the opportunity tarried. For ten years the Unionist Party was in power, and not until 1906 was the long exile of their opponents ended by the verdict of the constituencies.

During the Unionist régime the House of Lords gave no offence, naturally, to the Commons, but many reflective politicians regretted, and still regret, that the opportunity then afforded for a reform of the Second Chamber was neglected. No sooner, however, did the Liberals return to power than the contest was renewed. The Conservatives, in a hopeless minority in the Commons, were predominant in the Lords, and the latter House did not hesitate to deal drastically with the legislative projects of the new Government. In 1906 the Lords rejected a Plural Voting Bill,

largely amended the Agricultural Holdings Bill and the Irish Town Tenants Bill, and so completely emasculated an Education Bill that the Government dropped it. Sir Henry Campbell-Bannerman, who had become Prime Minister in 1905, gravely doubted whether he ought not forthwith to have asked the King for a dissolution and gone straight to the country for a mandate against the House of Lords. As he said in the House of Commons apropos of the emasculation of the Education Bill:

'It is plainly intolerable that a Second Chamber should, while one party in the State is in power, be its willing servant, and when that party has received unmistakable and emphatic condemnation by the country, be able to neutralize and thwart and distort the policy which the electors have shown they approve. . . . But the resources of the Constitution are not wholly exhausted. The resources of the House of Commons are not exhausted, and I say with conviction a way must be found, and a way will be found, by which the will of the people, expressed through their elected representatives in this House, will be made to prevail.' [1]

In a speech at Oxford (1 December 1906) Mr. Lloyd George put the point even more bluntly:

'If the House of Lords persisted in its present policy, it would be a much larger measure than the Education Bill that would come up for consideration. It would come upon this issue, whether the country was to be governed by the King and the Peers, or by the King and the people.' [1]

The session of 1907 carried the matter a stage further. The Speech with which King Edward opened it declared that 'serious questions had arisen from unfortunate differences between the two Houses', and that 'His Majesty's Ministers have this important subject under consideration with a view to a solution of the difficulty'. Towards the end of June the Government produced their plan, which differed from that which was ultimately embodied in the Parliament Act mainly in the omission of the stipulation

[1] *Life*, by J. A. Spender, ii. 312–13.

that the 'suspensive' veto of the Peers should extend over three sessions and not less than two years; and by the inclusion of a scheme for a joint conference between 'a small number of nominated representatives' of the two Houses after each rejection of a Bill by the Lords. Ministers had, however, decided that the 'powers' of the Second Chamber must be effectively restricted before any attempt was made to alter its composition. The 'Labour' Party, which first appeared as a substantial party in the Parliament of 1906, declared boldly for the entire abolition of the House of Lords on the ground that it represented interests that were opposed to the general well-being and that it was a hindrance to national progress. But the Government stuck to their guns, and by 432 votes against 147 the House of Commons passed the resolution prefixed to this chapter.

The translation of an abstract resolution into concrete legislation fell, however, into the hands of Sir Henry Campbell-Bannerman's successor, Mr. (now Earl of Oxford and) Asquith; and in the meantime much had happened.

In 1908 the House of Lords rejected an elaborate Licensing Bill by which the Temperance party set great store; in 1909 they pushed opposition to the policy of the Radical Government so far as to reject the Finance Bill of the year—Mr. Lloyd George's famous 'People's Budget'. That the Lords were within their constitutional rights is certain; that Mr. Lloyd George's financial proposals were fundamentally unsound was roundly asserted at the time, and has been shown by experience to be true: ill-designed for purposes of revenue; pregnant with possibilities of friction; grossly unequal and unfair to individuals; vastly complicated; uncertain in their incidence; above all, so designed as to produce at a maximum expense of collection a minimum of revenue. The Land Value Duties, which formed the special bone of contention, were, with the assent of their author, repealed in 1919, having proved to be, as the Chancellor of the Exchequer admitted, 'in their present form unworkable'. The total amount of revenue derived, down to 31 March 1919, from the Increment

Value Duty, the Undeveloped Land Duty, and the Reversion Duty was £1,087,440; the total expenditure incurred in connexion with the work of the Land Valuation Office and the collection of the duties on Land Values, down to the same date, was £4,600,000.[1] Apart from this, the Land Duties were mainly responsible for the arrest of speculative building, and for accentuating that shortage of working-class dwellings which proved to be one of the most obstinately difficult of post-war problems.

On economic grounds, therefore, the wisdom of the Lords was abundantly vindicated by the event. The political expediency of the course they followed was more questionable. The Lords, while admitting that in matters of pure finance the House of Commons must be supreme, contended that the Budget proposals were political rather than financial, and were deliberately framed to prepare the way for a social revolution, to which the House of Lords could assent only if it were specifically demanded by the electorate. On Lord Lansdowne's motion the Finance Bill was accordingly rejected by 350 votes to 75 (30 November 1909). The Commons retorted by a resolution that 'the action of the House of Lords in refusing to pass into law the financial provision made by this House for the service of the year is a breach of the Constitution, and a usurpation of the rights of the Commons'. Parliament was forthwith prorogued and on 10 January 1910 was dissolved.

To Caesar both parties had appealed. But between the appellants there was this essential difference: the one party insisted that only Caesar could decide; the other up to the last moment had vehemently protested that they were fully competent to act as judges in their own cause, and that the appeal to Caesar was uncalled for and impertinent.

The language used by Liberal Ministers left no doubt as to the issue which they desired to submit to the electorate. 'We shall not', said Mr. Asquith (10 December 1909), 'assume office, and we shall not hold office, unless we can se-

[1] *Official Report* (Commons), Fifth Series, vol. 114, pp. 1212 & 2723. The Mineral Rights Duty had produced £3,026,466.

cure the safeguards which experience shows to be necessary for the legislative ability and honour of the party of progress. . . . We are going to ask the country to give us authority to apply an effective remedy to these intolerable conditions. What is to be done will have to be done by Act of Parliament. The time for unwritten convention has unhappily gone by.'

What was the response of the electorate? Despite the efforts of the Radical leaders to concentrate attention on a single issue, it was not found easy to do so. In the background were other issues: the embryonic Socialism disclosed by the Budget proposals; tariff-reform and free-trade; Irish Home Rule. Nor was the verdict free from ambiguity. Liberals and Unionists were returned in almost equal numbers (274 Liberals to 273 Conservatives); Labour representation was reduced to 41; the Nationalists numbered 82. Assuming, as it was safe to do, that on the main issue the Socialists would side with the Liberals, it was plain that the Irish Nationalists held the balance. Nor did they fail to use to the full their advantage. From the Budget controversy they had held aloof; but to the attainment of Home Rule a co-ordinate Second Chamber offered an insurmountable obstacle. If the Nationalists were to help the Liberals to curtail the 'veto' of the Lords, the Liberals must pledge themselves to use the new powers conceded to the House of Commons to carry Home Rule.

Between the two parties there was some soreness, for at the election of 1906 Home Rule had been tacitly dropped out of the Liberal programme: in January 1910 the specific issue was that of the Second Chamber. The Nationalists, therefore, had some cause for alarm, if not for suspicion, and were not prepared to take any risks. A bargain was accordingly struck, if not in words, by an understanding sufficiently satisfactory to the Irish leaders. King Edward opened the new Parliament in person on 21 February 1910, and the King's Speech foreshadowed proposals to 'define the relations between the Houses of Parliament so as to

secure the undivided authority of the House of Commons in Finance and its predominance in legislation', and in March the following Resolutions were introduced into the House of Commons:

I. Money Bills

That it is expedient that the House of Lords be disabled by Law from rejecting or amending a Money Bill, but that any such limitation by law shall not be taken to diminish or qualify the existing rights of the House of Commons.

For the purposes of this Resolution a Bill shall be considered a Money Bill, if in the opinion of the Speaker it contains only provisions dealing with all or any of the following subjects, viz. the imposition, repeal, remission, alteration, or regulation of taxation; charges on the Consolidated Fund, or the provision of money by Parliament; Supply; the appropriation, control, or regulation of public money; the raising or guaranteeing of any loan or the repayment thereof, or matters incidental to those subjects or any of them.

II. Bills other than Money Bills

That it is expedient that the powers of the House of Lords as respects Bills other than Money Bills be restricted by law so that any such Bill which has passed the House of Commons in three successive sessions, and having been sent up to the House of Lords at least one month before the end of the session, has been rejected by the House in each of those sessions, shall become law without the consent of the House of Lords on the Royal Assent being declared: Provided that at least two years shall have elapsed between the date of the first introduction of the Bill in the House of Commons and the date on which it passes the House of Commons for the third time.

For the purposes of this Resolution a Bill shall be treated as rejected by the House of Lords if it has not been passed by the House of Lords either without Amendment or with such Amendments only as may be agreed upon by both Houses.

III. Duration of Parliament

That it is expedient to limit the duration of Parliament to five years.

These Resolutions were, after prolonged debate and divisions, carried on 14 April, and a Bill based upon them was on the same night introduced by the Prime Minister.

Almost simultaneously the following Resolutions were accepted by the House of Lords, but to them reference will be made later on:

I. That a strong and efficient Second Chamber is not merely an integral part of the British Constitution, but is necessary to the well-being of the State and to the balance of Parliament.

II. That such a Chamber can best be obtained by the reform and reconstitution of the House of Lords.

III. That a necessary preliminary of such reform and reconstitution is the acceptance of the principle that the possession of a peerage should no longer of itself give the right to sit and vote in the House of Lords.

On the night on which the Parliament Bill was introduced Mr. Asquith declared, in somewhat minatory terms, that if the Lords rejected the Bill, the Government would at once resign or recommend the King to dissolve Parliament. 'Let me', he proceeded, add this, that in no case shall we recommend a Dissolution except under such conditions as will secure that in the new Parliament the judgement of the people as expressed at the election will be carried into law.' However veiled, this was an unmistakable threat: the Government would not, as a Government, appeal to the country, unless the King were prepared to promise that, in the assumed event, he would assent to the creation of new peers in numbers sufficient to overcome the resistance of the House of Lords.

The views of the Government were communicated to King Edward at Biarritz, where he was taking a holiday. Before the threat could materialize a tragedy intervened: on 6 May King Edward died, and his only son reigned in his stead as King George V.

The new King, thus suddenly called to the throne, found himself confronted by a constitutional crisis more severe than any which had arisen since 1832, perhaps even since

1688. But the opening of a new reign, under circumstances almost tragic, gave pause to eager partisans and hushed for the moment political controversy. The nation as a whole was profoundly shocked by the death of an exceedingly popular King. People had, moreover, entertained a hope that the King's perfect tact and temper, his mellow wisdom, his ripe experience and his proverbial shrewdness would discover some way out of the political dilemma.

General sympathy was felt for his successor, unexpectedly called upon to deal with a situation so embarrassing. and, under an impulse common to all parties, the leaders endeavoured to reach a compromise. As Mr. Asquith himself admirably phrased it: 'Then the nation witnessed an incident unparalleled in the annals of party warfare. The two combatant forces, already in battle array, piled their arms, while the Leaders on both sides retired for private conference.'[1]

A small conference of eight persons,[2] drawn equally from the two parties, met, behind closed doors, in June, and on 29 July Mr. Asquith was able to announce that such progress had been made towards a settlement that negotiations would be resumed in the autumn. An agreement could not, however, be reached. After the twenty-first meeting the breakdown of the conference was announced (10 November), and on 28 November Parliament was prorogued.

Before the Prorogation Mr. Asquith and Lord Crewe had an interview with King George and placed before him a Cabinet memorandum couched in terms corresponding to the announcement made by Mr. Asquith in April. The memorandum ran as follows:

'His Majesty's Ministers cannot take the responsibility of advising a dissolution, unless they may understand that in the event of the policy of the Government being approved by an

[1] *Official Report* (Commons), Fifth Series, vol. xx, p. 86.

[2] Mr. Asquith, Mr. Lloyd George, Lord Crewe, and Mr. Birrell represented the Government; Mr. Balfour, the Marquess of Lansdowne, Earl Cawdor, and Mr. Austen Chamberlain the Unionists.

adequate majority in the new House of Commons His Majesty will be ready to exercise his Constitutional powers, which may involve the prerogative of creating Peers, if needed, to secure that effect shall be given to the decision of the country. His Majesty's Ministers are fully alive to the importance of keeping the name of the King out of the sphere of party and electoral controversy. They take upon themselves, as is their duty, the entire and exclusive responsibility for the policy which they would place before the electorate. His Majesty will probably agree that it would be inadvisable in the interests of the State that any communication of the intentions of the Crown should be made public unless and until the actual occasion should arise.'

How far were the terms of this historic memorandum in accord with constitutional theory and tradition?

On this point there was acute controversy at the time, nor can the question even now be answered authoritatively. What exactly took place at the interview between the King and Mr. Asquith and Lord Crewe on 16 November? That day, as Lord Rosebery said with unerring acumen, marked the 'true constitutional crisis'. What advice, if any, apart from that contained in the memorandum, was given by the Ministers to the King? Mr. Asquith's statement to the House of Commons two days after the interview told little. The story was told in much greater detail —whether in full we cannot know—by the only other person who could tell it, the Marquess of Crewe, in the famous debate of 8 August, 1911. 'Since this question of that interview', said Lord Crewe, 'has been the subject of so much comment, the King naturally desires that [the facts] should be plainly stated.' Lord Crewe then proceeded to to state them 'plainly': did he state them fully? Mr. Asquith's statement on the same subject was characterized by *The Times*[1] as a *suppressio veri* and *suggestio falsi*. Lord Crewe's statement in the Lords was certainly fuller. Was it complete? The essential passage ran as follows:

'The effect of that interview was that we ascertained His Majesty's view that if the opinion of the country were clearly

[1] 14 August, 1911.

ascertained upon the Parliament Bill, in the last resort a creation of Peers might be the only remedy and might be the only way of concluding the dispute. His Majesty faced the contingency and entertained the suggestion as a possible one with natural, and, if I may be permitted to use the phrase, with legitimate reluctance. His Majesty, however, naturally entertained the feeling—a feeling which we entirely shared—that if we resigned our offices, having as we had a large majority in the House of Commons, the only result could be an immediate Dissolution, in which it would be practically impossible, however anxious we naturally should be to do it, to keep the Crown out of the controversy. The mixing up of the Crown in a controversy such as that was naturally most distasteful to its illustrious wearer, . . . but it could be scarcely more distasteful even to His Majesty than to myself and my colleagues.'[1]

Lord Crewe frankly admitted that to him the 'whole business' was 'odious'; and we can well believe it. Lord Rosebery pointedly referred to something—not more precisely specified, as having given 'an unpleasant savour to the whole of this transaction', and Lord St. Aldwyn, speaking with knowledge, bluntly said (9 August): 'We have not the whole case before us.' He then proceeded to put certain questions which have never to this day been answered: 'Whether Mr. Balfour and Lord Lansdowne were ever suggested to the King by his Ministers as persons who might be prepared to form a Government in the event of the King declining to give the promise asked for by the Ministers.' The King

'ought to have had the fullest possible information and to have heard both sides of the question. The King ought to have been told that he was at liberty to hear what Lord Lansdowne and Mr. Balfour had to say before making up his mind as to whether he would give that hypothetical promise. . . . If [the Ministers] had had common generosity, they would have advised the King to do what I have suggested. . . . I go further and say that it would have been common honesty from the advisers of the Sovereign to the Sovereign. . . . What has been the result? When the crisis came near us the other day Ministers tendered

[1] *Official Report* (Lords), 8 August 1911, pp. 836, 837.

certain advice to the Sovereign and he accepted it. But he was previously bound by his hypothetical promise. The King has been misled by his Ministers.'

These are grave words, coming from a man of Lord St. Aldwyn's gravity and experience, and would seem to justify his touching words:

'I have served the Sovereign of this country in political office for more than twenty years, and I feel most deeply the position of my Sovereign at the present moment. I believe the action of the Government has deliberately placed him in the most cruel position any English Sovereign has been placed in for more than a century.' [1]

No apology is needed for quoting at length from this historic debate, for the point then raised touched the most subtle spot in the delicately poised machinery of the English Constitution: the relations between the Sovereign and his confidential advisers; between the formal and the actual executive of this kingdom. Lord Rosebery's view of this delicate question differed somewhat, though not essentially, from Lord St. Aldwyn's. While taking the view that it would have been 'open to the Sovereign to say that, before he acceded to so enormous a demand, he should be allowed to take counsel with Ex-Ministers', Lord Rosebery held that it was no part of the obvious duty of the existing Ministers to advise such a course. Nevertheless, their failure to do so undoubtedly gave 'an unpleasant savour' to the whole transaction.

If we leave the heated atmosphere of parliamentary debate and turn to the more considered and more detached *dicta* of the constitutional jurist, we find that a similar view is expressed by Sir William Anson:

'The Ministers of the Crown', he wrote, 'are entitled to its full confidence, and this means, first, that the Sovereign shall not seek or take advice from others in matters of State unknown to them; next, that he shall not give public expression to opinions on matters of State unadvised by them.'

[1] *Official Report*, 9, pp. 923 seq.

The reader will not fail to observe in the above passage the limiting words, 'unknown to them'. These would seem to be important, for elsewhere the same eminent authority lays down with equal explicitness the right of every individual Peer (and it might be added, every Privy Councillor) to have audience of the Sovereign.

'It is the privilege of each individual Peer to have audience of the Sovereign. Such a right was freely exercised in the eighteenth century, when parties were less coherent, members of Cabinets less loyal to one another, and the King more ready to listen to advice given to him by others than his responsible Ministers. At the present day a Peer would hesitate to offer counsel to the Crown on any matter which fell within the province of the Ministry of the day. Nevertheless, the King has a right to demand, and any Peer, whether of the United Kingdom, of Scotland, or of Ireland, has a right to offer counsel on matters which are of importance to the public welfare.'

And Sir William Anson adds:

'The right is to go singly, and the application for such an audience is made through an officer of the household, not through the Secretary of State.'[1]

The existence, still more the exercise, of such a privilege on the part of a Peer evidently involves corresponding rights on the part of the responsible advisers of the Crown. First: the right to be informed; and, secondly, the right of protest, protest which may be carried to the length of resignation.

In regard to a matter of constitutional precept and practice so subtle as that under discussion, it may be thought more satisfactory to rely upon the authority of statesmen who have actually been called upon to advise the Sovereign rather than upon that of jurists, however eminent. And we are fortunate to be able to put into the witness-box two exceptionally distinguished Prime Ministers. The first dictum has behind it the authority of Mr. Gladstone:

'It does not seem', he writes, 'easy to limit the Sovereign's right of taking friendly counsel, by any absolute rule, to the

[1] Anson, *Law and Custom*, ii. 1, 137.

case of a husband. If it is the Queen's duty to form a judgement upon important proposals submitted to her by her Ministers, she has an indisputable right to the use of all instruments which will enable her to discharge that duty with effect: subject always, and subject only, to the one vital condition that they do not disturb the relation, on which the whole machinery of the Constitution hinges, between those Ministers and the Queen. She cannot, therefore, as a rule, legitimately consult in private on political matters with the party in opposition to the Government of the day; but she will have copious public means, in common with the rest of the nation, for knowing their general view through Parliament and the Press. She cannot consult at all, except in the strictest secrecy, for the doubts, the misgivings, the inquiries, which accompany all impartial deliberation in the mind of a Sovereign as well as of a subject, and which would transpire in the course of promiscuous conversation, are not matters fit for exhibition to the world. The dignity of the Crown requires that it should never come into contact with the public, or with the Cabinet, in mental *déshabille*; and that the words of its wearer should be ripe, well considered, few. For like reasons, it is plain that the Sovereign cannot legitimately be in confidential communication with many minds. Nor, again, with the representatives of classes or professions as such, for their views are commonly narrow and self-centred, not freely swayed, as they ought to be, by the paramount interests of the whole body politic.' [1]

The second *locus classicus* is of even greater interest and significance, since it refers not merely to an abstract theory, but to an actual episode of recent political history:

In November 1831 the Duke of Wellington, who was then in acute opposition to the Ministry of Lord Grey, laid before the King in writing certain information as to the reported supply of arms to the Birmingham Political Union. Lord Grey resented—not unnaturally—the uninvited intrusion of one of his political opponents, and was at no pains to conceal his resentment from the Private Secretary of the King. 'I never', he writes, 'was more

[1] Review of Martin's *Life of Prince Consort*, ap. *Gleanings of Past Years*, vol. i, pp. 72–3.

surprised than at reading these communications, the object of which cannot be misunderstood, and the propriety and constitutional character of them appear to me more than questionable.'

The King, without consulting his Ministers, intimated to the Duke that he thought his alarm unnecessary, but he never questioned the right of the Duke to communicate directly with the Sovereign. On the contrary, 'His Majesty observed when he read the Duke's letter that, as a Peer and a Privy Councillor, he had a right to address to him by letter that which he might have communicated in a private audience if he had thought fit to ask for it'.[1] At the same time, the King flattered himself that his reply to the Duke was calculated 'to show that he relied with confidence upon the vigilance and energy of his Government', and 'he was not sorry to have this opportunity of doing justice to the proceedings of his confidential servants'. The King clearly thought that by a direct and immediate answer to the Duke of Wellington he was doing a service to the Cabinet and affording timely testimony to the 'close union of sentiment on the subject between His Majesty and his Government'. It is, however, equally clear that Lord Grey and the Cabinet were not entirely satisfied to leave things thus.

In a final letter Lord Grey expresses his gratitude to the King 'for the kind considerations which have influenced His Majesty's conduct in the late correspondence', and his sense of 'both the kindness and the advantage of His Majesty's first answer to the Duke'. At the same time he lays down with directness and emphasis what appeared to him the constitutional doctrine on the matter:

'It certainly might in many cases produce inconvenience if His Majesty were to express opinions to any but his confidential servants in matters which may come under his consideration with a view to the advice to be submitted to His Majesty upon them. I cannot, therefore, hesitate to express my satisfaction at His Majesty's having resolved to confine his answers to

[1] Sir H. Taylor to Earl Grey, 13 November 1831.

such communications as those lately made by the Duke of Wellington in the future to a simple acknowledgement of their reception.'[1]

What is the bearing of these dicta upon the position of the Crown during the crisis of 1910–11? Two conclusions clearly emerge. On the one hand it is indubitable that in November 1910, when confronted by his confidential advisers with a demand for 'contingent guarantees', the King had a perfect right to seek counsel from any Peer or Privy Councillor. We have it from Lord Lansdowne that the King did not avail himself of that right in respect of the two most obvious Privy Councillors—the leaders of the Opposition in the Lords and Commons respectively.

Conversely, His Majesty's confidential servants had, on their part, an equal right to decline to be responsible for the conduct of affairs if the Sovereign chose to exercise the right of consulting any members of the Opposition.

This then is the point of nicety. Admitting the constitutional soundness of the doctrine here laid down, would either party have been justified by convention in asserting to the full the formal rights which respectively belong to them? We have no right to assume that King George desired the leave of his Ministers to take counsel with experienced Privy Councillors adhering to the opposite party. But if he did desire to do so, and if his desire was frustrated by the action or threatened action of his official advisers, it would be difficult to discover terms sufficiently strong to stigmatize their conduct. Should the public ever learn upon authority that the Ministry had so acted towards their King, a new force and interpretation would be given to the phrases used by Lord Crewe, Lord Rosebery, and Lord St. Aldwyn. An 'odious business' the whole transaction will appear to posterity; 'an unpleasant savour' will indeed cling for ever to the proceedings of November 1910. Then indeed will history subscribe to the judgement pronounced by the veteran Conservative leader, Lord St. Aldwyn, and will declare with emphasis that 'the

[1] *Correspondence between William IV and Earl Grey*, i. 424.

King has been placed by the action of his Ministers in the most cruel position in which any Sovereign could be placed'. That Mr. Asquith and his colleagues would have been within their formal Constitutional right in declining to allow the King to consult Mr. Balfour and Lord Lansdowne I do not for an instant deny. But I do venture to assert that if ever there were circumstances which would have justified, and even demanded, forbearance and generosity on the part of Ministers towards the Sovereign, and let me add (though it is irrelevant) towards political opponents, they were those which obtained in November 1910.

The King was still uncrowned; he was still mourning a revered father; he had not had time to grasp firmly the reins even of such power as the conventions of the Constitution still secure to him. The country had expressed itself very ambiguously on the main issue which divided parties. Public opinion in the English constituencies was obviously undecided. The leaders of the two great parties had for months past been in close and constant communion, attempting to arrive at a settlement by consent of the great Constitutional issue—perhaps of other matters as well. What could have been more proper and natural, under the circumstances, than that the King should desire to hear, at first hand, both sides of the question or questions, which had long been under confidential discussion between his Ministers and ex-Ministers? Might he not even have desired to step in as a conciliator, and attempt the adjustment of the differences which divided the members of the Conference? Whether His Majesty did desire to take counsel of the Opposition leaders is the point which the authorized revelations did not disclose. If it should prove that this desire was thwarted, either directly or indirectly, by his Ministers, history will know how to judge, and will undoubtedly judge with the utmost severity, conduct which is, I believe, without parallel in the history of the English monarchy.

It may be objected that we have no right to pass a hypo-

thetical censure upon the basis of facts which have not been established. Be it admitted. But no one can read with care the report of the debate in the House of Lords without perceiving that the questions pushed home by the Opposition, and notably by Lord St. Aldwyn, were evaded by Ministers. 'You want us to produce all the papers! There are none.' Such was the burden of Lord Morley's reply. And no one doubted his accuracy or good faith. But what the public wanted, and what history will extort, is not 'papers', but full information. Was the King told 'that he was at liberty to hear what Lord Lansdowne and Mr. Balfour had to say before making up his mind as to whether he would make a hypothetical promise.' This question was not answered by Ministers, and from the silence of Ministers we are free, therefore, to draw what inferences we will. Nor are we left entirely in the realm of inference. We know from Lord Crewe that the King and his Ministers were alike influenced by an anxiety 'to keep the Crown out of the controversy'. But why, given good will on the part of the Cabinet, would it have been 'practically impossible' to do so? We are compelled to infer that had the King insisted on taking counsel with ex-Ministers, Mr. Asquith and his colleagues would have resigned, and that the Sovereign was advised that if they resigned it would be practically impossible 'to keep the Crown out of the controversy'.

Assuming that the inference be correct, is it too much to say that a loaded pistol was put at the King's head, and that His Majesty was told that although the Ministers would not pull the trigger themselves, somebody else would?

It has seemed advisable to recall the details of a sordid story in order to bring home to a post-war generation the political atmosphere in the midst of which the Parliament Bill was finally placed upon the Statute Book. But we have somewhat anticipated the sequence of events.

The dissolution for which, as we have seen, the Radical

Ministry asked King George was followed in December 1910 by a General Election. The electors had not changed their minds since January. Between Radicals and Unionists there was a tie (272); Labour, with 42 members, gained one seat, and the Irish Nationalists two (84). The Nationalists, therefore, remained masters of the situation; nor did they modify their terms.

Accordingly, despite the fact that the British electorate had shown itself for the second time to be sharply, almost equally, divided on the subject, the Parliament Bill was reintroduced in February, and was carried on second reading by 368 to 243 in March, and by a similar majority on third reading in May.

Would the House of Lords accept it? On the day on which the Commons passed the third reading of the Parliament Bill (May 15) Lord Lansdowne moved the second reading of his House of Lords Reconstitution Bill, the detailed proposals of which will be explained later. But this Bill dealt only with the composition of the Second Chamber, not with its powers. Moreover, the effort at reform from within, though heroic, was out of time. Had it been made at any time between 1895 and 1905 it might have profoundly altered the subsequent course of events. Put forward as it was in the midst of an acute political crisis, Lord Lansdowne's moderate and statesmanlike proposal received far less consideration than it deserved. The fate of the Parliament Bill was still undecided, and the problem of 'Powers' overshadowed, therefore, for the moment the problem of Composition. Would the Peers allow the Bill to pass, or would they compel the Government to 'swamp' them by the creation of new Peers? Would the King feel bound by the hypothetical promise—if promise there was—extorted from him in the previous November?

The Peers were sharply divided in opinion. On the one hand the 'Hedgers', led by Lord Lansdowne, preferred to accept the Parliament Act, with all its consequences, rather than suffer the shame of being compelled to receive

into their bosom five hundred Radical Peers pledged to a limitation of the constitutional powers of the Order to which they had obtained admission. On the other hand, the 'Ditchers', led by the veteran Earl of Halsbury, were resolved if necessary to die in the last ditch and to compel the Crown to choose between a refusal of the advice of his responsible Ministers and the employment of a weapon as odious as it was rusty and dangerous. The 'Ditchers' held or professed a belief that the Ministerial threat was an empty one, and that, at the eleventh hour, Ministers themselves, or if not the Ministers then the King, would recoil from the precipice to whose edge events had led them. But the 'Hedgers' were not ready to take the risk; their opinion prevailed, and the Parliament Bill became law. On the same day (10 August) that the Peers (as many held) signed their own death warrant, the members of the House of Commons voted to themselves salaries of £400 a year.

The Parliament Act, however it be regarded, must be accounted as one of the most significant contributions ever made to a Constitution which is mainly unwritten. For the first time the legal relations of the two Houses of the Legislature were defined by statute. A preamble of unusual length and importance declared that it was 'intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis'. The operative clauses of the Act were as follows:

1.—(1) If a Money Bill, having been passed by the House of Commons, and sent up to the House of Lords at least one month before the end of the session, is not passed by the House of Lords without amendment within one month after it is so sent up to that House, the Bill shall, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal Assent being signified, notwithstanding that the House of Lords have not consented to the Bill.

(2) A Money Bill means a Public Bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects, namely, the

imposition, repeal, remission, alteration, or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund, or on money provided by Parliament, or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them. In this subsection the expressions 'taxation', 'public money,' and 'loan' respectively do not include any taxation, money, or loan raised by local authorities or bodies for local purposes.

(3) There shall be endorsed on every Money Bill when it is sent up to the House of Lords and when it is presented to His Majesty for assent the certificate of the Speaker of the House of Commons signed by him that it is a Money Bill. Before giving his certificate, the Speaker shall consult, if practicable, two members to be appointed from the Chairmen's Panel at the beginning of each Session by the Committee of Selection.

2.—(1) If any Public Bill (other than a Money Bill or a Bill containing any provision to extend the maximum duration of Parliament beyond five years) is passed by the House of Commons in three successive sessions (whether of the same Parliament or not), and, having been sent up to the House of Lords at least one month before the end of the session, is rejected by the House of Lords in each of those sessions, that Bill shall, on its rejection for the third time by the House of Lords, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal Assent being signified thereto, notwithstanding that the House of Lords have not consented to the Bill: Provided that this provision shall not take effect unless two years have elapsed between the date of the second reading in the first of those sessions of the Bill in the House of Commons and the date on which it passes the House of Commons in the third of those sessions.

(2) When a Bill is presented to His Majesty for assent in pursuance of the provisions of this section, there shall be endorsed on the Bill the certificate of the Speaker of the House of Commons signed by him that the provisions of this section have been duly complied with.

(3) A Bill shall be deemed to be rejected by the House of

Lords if it is not passed by the House of Lords either without amendment or with such amendments only as may be agreed to by both Houses.

(4) A Bill shall be deemed to be the same Bill as a former Bill sent up to the House of Lords in the preceding session if, when it is sent up to the House of Lords, it is identical with the former Bill or contains only such alterations as are certified by the Speaker of the House of Commons to be necessary owing to the time which has elapsed since the date of the former Bill, or to represent any amendments which have been made by the House of Lords in the former Bill in the preceding session, and any amendments which are certified by the Speaker to have been made by the House of Lords in the third session and agreed to by the House of Commons shall be inserted in the Bill as presented for Royal Assent in pursuance of this section:

Provided that the House of Commons may, if they think fit, on the passage of such a Bill through the House in the second or third session, suggest any further amendments without inserting the amendments in the Bill, and any such suggested amendments shall be considered by the House of Lords, and, if agreed to by that House, shall be treated as amendments made by the House of Lords and agreed to by the House of Commons; but the exercise of this power by the House of Commons shall not affect the operation of this section in the event of the Bill being rejected by the House of Lords.

3. Any certificate of the Speaker of the House of Commons given under this Act shall be conclusive for all purposes, and shall not be questioned in any court of law.

4.—(1) In every Bill presented to His Majesty under the preceding provisions of this Act, the words of enactment shall be as follows, that is to say:

'Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Commons in this present Parliament assembled, in accordance with the provisions of the Parliament Act, 1911, and by authority of the same, as follows.'

(2) Any alteration of a Bill necessary to give effect to this section shall not be deemed to be an amendment of the Bill.

5. In this Act the expression 'Public Bill' does not include any Bill for confirming a Provisional Order.

6. Nothing in this Act shall diminish or qualify the existing rights and privileges of the House of Commons.

7. Five years shall be substituted for seven years as the time fixed for the maximum duration of Parliament under the Septennial Act, 1715.

8. This Act may be cited as the Parliament Act, 1911.

The intention expressed in the Preamble has not yet (1927) been fulfilled. For the rest it will be observed that the Act (i) deprives the House of Lords of all power in regard to 'Money Bills'; (ii) vests in the Speaker the absolute and unfettered right to decide what is or is not a 'Money Bill'; (iii) restricts the power of the House of Lords over general legislation (Public Bills other than Money Bills) to a suspensive veto of two years; and (iv) limits the duration of Parliament to five years. The machinery of the Parliament Act cannot, therefore, be employed to prolong the existence of Parliament, though, with the assent of the House of Lords, the duration of a Parliament can be, and during the War was by successive Acts, extended.

The procedure contemplated by the Act was in fact adopted in the case of the Irish Home Rule Bill of 1913, and also of the Bill for the Disestablishment and Disendowment of the English Church in Wales, and but for the outbreak of the War in August 1914 the assistance of the Act would doubtless have been invoked. The latter Bill did in substance become law, with the assent of the Peers; the former, for reasons into which it is not necessary to enter, did not; though it supplied a fulcrum for the enactment of the Bill for 'the Better Government of Ireland', promoted and passed by the Coalition Government in 1920.

As regards Money Bills no friction has, since 1911, arisen between the two Houses, though the exclusive right of the Speaker to certify a 'Money Bill' has been the subject of general criticism, if not of complaint in any specific instance. The definition in Clause 2, though detailed, is not really satisfactory. It has been proved to be at once

widely inclusive and curiously restrictive. Bills have been certified by the Speaker though they did not grant money to the Crown for Supply Services, while of the Finance Bills since the passing of the Parliament Act at least six did not receive the Speaker's certificate as 'Money Bills'. Even more remarkable is it to learn on the authority of Viscount Ullswater,[1] who was Speaker in 1909, that the famous Budget of that year would not have come within the provisions of the Parliament Act. Had this Act, therefore, been at that time on the Statute Book the Lords would have been within their legal rights, as they unquestionably were at the time, in rejecting it.

With the intentions of its Preamble unfulfilled, the Parliament Act itself remains a legislative *torso*. Will the promise ever be implemented? If it is not, the reason will not be discovered, as the next chapter will disclose, in the obstinate refusal of the House of Lords to consider schemes for drastic reforms in its own Constitution.

[1] *A Speaker's Commentaries*, ii. 103.

[*Note to chapter XII.* The second volume of Sir Sidney Lee's *Biography of King Edward VII* appears as these pages are going to press. It proves that the question of the House of Lords was giving deep concern to his late Majesty, who had his own scheme (cf. p. 695) for its reform. See also pp. 455–7, 464–7, 476–7, 576, 651–2, 665–7, 693, 695–7, 700–701, 704–5, 707, 710–14, 724.]

XIII. THE REFORM OF THE HOUSE OF LORDS

'What there is expected from a well constituted Second Chamber is not a rival infallibility, but an additional security. It is hardly too much to say that in this view almost any Second Chamber is better than none.'—SIR HENRY MAINE.

'There is no use in having a Second Chamber unless you give it substantial powers; but it is to be remembered that the more powers you give the more popular must be the composition of the Chamber.'—VISCOUNT BRYCE (1921).

CAN the House of Lords remain untouched while the House of Commons is being transformed out of all recognition? Must there not be some reform in the Constitution, some revision of the powers of the Second Chamber, when the base of the Lower House is ever broadening under the impulse derived from advancing Democracy? Shall the Lords be ended or mended? During the last half-century, or more, questions such as these have been constantly in the minds, and not infrequently on the lips, of politicians and publicists. Sixty years ago Walter Bagehot subjected the House of Lords, as he subjected other parts of the Constitution, to an acute if general analysis. He concluded that it played, and might, if prudently led, continue to play a useful, if modest, part in the general scheme of the English Polity. There lurks, however, a fallacy in the suggestion that the House of Lords has remained since 1832 'untouched'. Not less than the House of Commons it has been transformed. A Rip van Winkle, having gone to sleep in 1832 and awaking to-day, would find it not less difficult to recognize the House of Lords than the House of Commons. To begin with, the Upper House has almost doubled in size, while the Lower has remained practically constant in numbers. It has changed even more markedly in social complexion. In 1832 the Upper House consisted of a select body of great landowners. To-day it is a microcosm of the nation: Art, Letters, Medicine, Law, Industry, Trade, Finance, are all represented, many of them strongly, on the red-leathered benches of the Gilded Chamber;

manual labour, alone among the great interests of the community, is unable to speak there with its own voice. All its members, however, save for a handful of Judges and Bishops, sit by virtue of the possession of an hereditary peerage; nor did the House suffer, until 1911, any restriction of its nominally co-ordinate powers.

In these facts we have evidence both of the innate conservatism of the English people and of the prudence and moderation of those to whom, in successive generations, the House of Lords has looked for guidance.

Yet, with every extension of the parliamentary suffrage, with the far-reaching changes in Local Government brought about by the Acts of 1888 and 1894, the anomaly of the situation became more marked, and the possibilities of serious friction between the two Houses were multiplied. Only the experience and tact of Queen Victoria averted a serious conflict in regard to Irish Disestablishment in 1869, and in regard to the County Franchise Bill of 1884. Mr. Gladstone himself gratefully acknowledged the good offices of the Sovereign on those critical occasions. The rejection of the Home Rule Bill of 1893 evoked from the same statesman the threat already quoted, and was the real, though premature, opening of the struggle which issued in the Parliament Act of 1911.

Did that Act mark the close of a volume or only of a chapter? The Radical and later on the Socialist Party were well content with the results achieved in 1911; but the Preamble to the Act remained a perpetual reminder that the work of reform was but half accomplished.

For fifty years before the passing of the Parliament Act far-sighted leaders in the House of Lords had, from time to time, endeavoured to induce their brethren to anticipate and avert revolution by timely reform.

As far back as 1869, Earl Russell, who a generation earlier had been mainly instrumental in reforming the House of Commons, tried his hand on the House of Lords. He introduced a Life Peerage Bill, to empower the Crown to create twenty-eight life Peers, not more than four of

whom were to be created in any one year. The Bill was supported by Lord Salisbury, 'as founded on a sound principle,' and obtained a second reading; but after considerable amendment in committee, it was rejected on the third reading by 106 to 76 votes. The same year witnessed an attempt on the part of Lord Grey to amend the laws relating to the election of representative peers for Scotland and for Ireland. But the matter was for the time being shelved by reference to a Select Committee. In 1874 a Select Committee under the chairmanship of Lord Rosebery recommended various changes in regard to the Scotch and Irish Peerages; but no legislative action was taken, and for the next ten years no further attempt at reform was made. In 1884 Lord Rosebery moved for the appointment of a Select Committee 'to consider the best means for promoting the efficiency of the House'. To this end he advocated:

(1) The enlargement of the quorum in the Upper House; (2) the introduction of a system of joint Committees of the two Houses of Parliament for the consideration of both public and private Bills; (3) the representation in the House of Lords of the Churches, of the professional, commercial, and labouring classes, of Science, Art, and Literature, and of the Colonies; and (4) the extension of the system of life Peerages.

Lord Rosebery also suggested the possibility of establishing the principle of summoning to the House of Lords consultative and temporary representatives or assessors, to deliberate and advise. The motion was rejected by 77 to 38 votes, but four years later he returned to the attack. In moving once again, in 1888, for the appointment of a Select Committee, Lord Rosebery laid down certain definite lines upon which reform might be carried into effect. He recommended:

(1) That any reform should respect the name and ancient traditions of the House; (2) that the whole body of Peers, including Scottish and Irish Peers without seats in the House, should delegate a certain number of mem-

bers to sit for a limited period as representative Peers; a minority vote necessary; (3) that a reconstructed House of Lords should also contain a large number of elected Peers, 'elected either by the future County Boards or by the larger Municipalities, or even by the House of Commons, or by all three'; (4) that life and official Peerages should form a valuable element in a reformed House; (5) that the proportions of these various elements should be definitely fixed; (6) that the great self-governing Colonies should be invited to send their Agents-General, or representatives delegated for the purpose, to sit, under certain conditions, in the House of Lords; (7) that any person should be free to accept or refuse a writ of summons to the House of Lords; and (8) that any Peer who had refused or had not received a writ of summons to the House of Lords should be capable of being elected to the House of Commons.[1]

Lord Rosebery also suggested that in cases of dispute between the two Houses the Lords and Commons should meet together, and then by certain fixed majorities carry or reject any measure which was in dispute between them.

Lord Rosebery's motion was again rejected, and a similar fate awaited the attempt of Lord Dunraven to embody in a Bill the principles advocated by Lord Rosebery. In the same session Lord Salisbury carried to a second reading a Bill empowering the Crown to appoint as a life Peer any person who had been (*a*) for not less than two years a Judge of the High Court; (*b*) a Rear-Admiral or Major-General or of some higher naval or military rank; (*c*) an Ambassador; (*d*) in the Civil Service and a member of the Privy Council; or (*e*) for not less than five years a Governor-General or Governor in the Oversea Dominions, or a Lieutenant-Governor in India. It was provided that not more than three such persons should be appointed in any one year, but that the Crown should be further empowered to appoint two other Life Peers on account of any special qualification other than the afore-mentioned.

[1] Quoted from *Report of Rosebery Committee*, appendix A.

In no case was the total number of Life Peers created under the Act to exceed fifty at any time. In the same session Lord Salisbury introduced a Bill empowering the Crown, on an Address from the House of Lords itself, either temporarily or permanently to cancel writs of summons to Peers.

It is very greatly to be regretted that Lord Salisbury did not persevere in his efforts to make a real beginning with the reform of the Constitution of the House of Lords. He had an opportunity such as few Prime Ministers have enjoyed. He was not merely all powerful in the Lords, but commanded a large majority in the House of Commons. The negligence of the Tory party in the matter of structural repairs has tempted their opponents to undertake the work of demolition. The strength of a chain depends on its weakest link: the reputation of the House of Lords depends on the character of its least reputable members. It is true that the latter do not often obtrude themselves on its divisions; still less seldom on its debates. But they exist. Hence comes the paradox that while the individual opinions of the leading members of the House of Lords command the respectful attention of every serious-minded citizen, the collective opinion of the House counts for little. Had Lord Salisbury brought his views to legislative fruition, this anomaly would no longer exist. The House of Lords would have been both purged and reinvigorated. That the abandoned Bills of 1888 would have done all that is now required is not contended; but they would have done something, and have opened the way for more.

So matters remained until the introduction of Lord Newton's Reform Bill of 1907. The details of his Bill it is unnecessary to set forth, as most of the principles reappear in the Report of the Select Committee which, on the withdrawal of Lord Newton's Bill, was appointed 'to consider the suggestions which have from time to time been made for increasing the efficiency of the House of Lords in matters affecting legislation.' [1]

[1] Report from the Select Committee of the House of Lords. Appendix A (234), December 1908.

This Committee sat under the chairmanship of Lord Rosebery, and included the Archbishop of Canterbury, the Dukes of Norfolk, Bedford, Devonshire, and Northumberland, and Lords Lansdowne, Jersey, Cawdor, Selby (a former Speaker of the House of Commons), St. Aldwyn, Midleton, Newton, Curzon of Kedleston, Courtney of Penwith, Lytton, Halsbury, and others. The published minutes of the proceedings show that in regard to its main proposals the Committee was, but for the redoubtable opposition of Lord Halsbury, practically unanimous.

The Report of this Committee, published in December 1908, formed an epoch in the history of the House of Lords. For the first time the leading members of that House showed themselves to be unanimously of opinion that a radical reform of its constitution was urgently required, and to be further agreed as to the main lines on which such a reform should proceed.

The Committee explicitly disavowed the intention 'of designing a new and symmetrical Senate'. They pointed out that 'even if such a body could be brought into being, its creation would involve a complete and revolutionary change in the Constitution'. Experience, moreover, teaches that 'it is difficult to impart to a new-born body of this description that authority which has resulted from the immemorial sanction of history and tradition'. The Committee, therefore, endeavoured in their recommendations 'to preserve, as far as possible, the fabric and position of the House of Lords within the Constitution, with such modifications only as the circumstances of the age and the needs of efficiency seem to require'. After this emphatic avowal of a spirit of reverent conservatism—an avowal which confronts us on the threshold of the Report—it is perhaps a little startling to learn that the Committee 'at an early stage in their proceedings came to the conclusion that, except in the case of Peers of the Blood Royal, it was undesirable that the possession of a Peerage should of itself give the right to sit and vote in the House of Lords'. It follows from this recommendation that 'in future the

dignity of a Peer and the dignity of a Lord of Parliament would be separate and distinct. The latter would carry with it the right to sit and vote in the House of Lords, which the former would not.'

On what grounds did this fundamental—if not revolutionary—change commend itself to a Committee largely Conservative in composition? The question was obviously a delicate one for a Committee of Peers, and their answer was a model of discretion and tact. They suggested (i) that the numbers of the House within recent years have increased so largely that some reduction for legislative purposes is expedient; (ii) that it is desirable to relieve from their Parliamentary duties Peers to whom such work is irksome and ill-suited, but to whom it has come inevitably by inheritance; and (iii) that it is necessary in the interests of the House itself to eliminate by a process of selection ' Peers whom it is inexpedient for various reasons to entrust with legislative responsibilities.'

There is one point on which all who desire to increase the legislative efficiency of the House of Lords are substantially agreed. The first essential step towards reform must be a rigorous curtailment of members. During the last century and a half the creation of Peerages has been on a most lavish scale. On the accession of George III the House included less than 200 Peers; on that of Queen Victoria, this figure had risen to 423. During the sixty-three years of Queen Victoria's reign the peerage increased from 423 to 592, and on the accession of King George V the House of Lords contained 622. Mr. Lloyd George created nearly 100 new Peers in less than six years, and at present the House contains no fewer than 742 members. To add a number of 'qualification' Lords of Parliament or life Peers to the existing House of over 700 members would by general consent be a piece of mere futility. They would necessarily be outnumbered and outvoted by 'gentlemen with titles', to adopt Mr. Asquith's description, 'beaten up from all quarters of the horizon'. As a fact these 'backwoodsmen' rarely if ever attend. The scanty attendance

of Peers is indeed one of the arguments most commonly adduced for the forfeiture of their privileges. 156 Peers have not even attended to take the oath. The largest division since the war records the attendance of only 268, and only on seven occasions have the Division lists included as many as 200. Yet more than 700 are, or might be, qualified to take part in the business of the House.

And this is the root difficulty, not to say the scandal, of the existing situation. If the voting work of the House of Lords were confined to the batch of Peers to whom the conduct of its business is ordinarily entrusted, and to whom in practice its debates are confined, there would be little call and less reason for reform. It is a commonplace of political criticism to say that the general level of debate and the conduct of business in the House of Lords contrast favourably with those of any legislative assembly in the world.

But how is the necessary curtailment of numbers to be effected? On this point there was considerable difference of opinion among the members of the Rosebery Committee. Some would have preferred merely to ask the hereditary Peers 'to delegate their powers to representatives from among themselves' and to allow these representatives, together with a limited number of life Peers, to constitute the reformed House. Eventually, however, the Committee decided, but only 'after long and anxious deliberation', to adopt the much more drastic principle already indicated. They accepted, indeed, the inclusion of delegates from the hereditary Peerage, and of life Peers; but they resolved that in future *qualification* 'should be the main test for admission to the reformed House of Lords'. Some of them went even further, and avowed their conviction 'that the best guarantee for the satisfactory performance of legislative duties lay in the experience of affairs derived from the tenure of high and responsible office or from active service in public life'. Obviously, the principle of 'qualification', once accepted, would act as a ground of exclusion no less effectively than as one of inclusion.

Of whom, then, should the future 'House of Lords' consist? The Rosebery Committee recommended that it should include six distinct elements: (1) Peers of the Royal Blood; (2) Lords of Appeal in Ordinary; (3) a considerable body (200) of representatives elected by the hereditary Peers; (4) hereditary Peers possessing certain specified qualifications; (5) Spiritual 'Lords of Parliament'; and (6) Life Peers.

The first two categories alone remained entirely unaffected by the proposals of the Committee. The third was an adaptation of a principle which has been for two hundred years recognized in our Constitution. The Peers of the United Kingdom were to delegate their legislative functions to two hundred of their own number, elected for each new Parliament by a cumulative vote. The future position of the Scotch and Irish Peerage demands, in this connexion, a word of explanation. The Committee wisely anticipated that a question might be raised as to the infraction or modification of the Acts of Union with Scotland and Ireland respectively.

By the former the Scotch Peers are entitled to elect sixteen Peers to represent them for the duration of each Parliament; by the latter the Irish Peers elect twenty-eight Peers who hold their seats for life. But since the Irish Union striking changes have occurred in the distribution of population as between the three constituent parts of the United Kingdom. In the year 1801 the population of Ireland was only some two millions less than that of England, and was more than four times as great as that of Scotland.[1] In 1908 the population of Ireland, instead of being nearly four-fifths that of England, was little more than one-ninth, and was less than that of Scotland, instead of being four times as large. Under these circumstances the draft report of the Committee suggested that the representation of the Scotch and Irish Peerage should be equalized, and that each should be represented in the re-

[1] England, 8,892,000; Ireland, 6,800,000; Scotland, 1,600,000. Cf. *Draft* Report, §§ 17, 18.

formed House by not less than twenty of their own number. If by some mischance the irreducible minimum of forty was not automatically obtained, the election was to be invalidated. Before the Report was finally adopted wiser counsels prevailed, and this clumsy contrivance disappeared. It was proposed that the Peerages of the three kingdoms should be fused into one electoral body which would comprise about 665 Peers, of whom 173 would be holders of Irish and 87 holders of Scotch Peerages. Of the total number of 200 Peers to be elected as Lords of Parliament it was calculated that if the cumulative vote or any other scheme of proportional representation were adopted it would be in the power of the Irish Peers to elect 51 representatives and for the Scotch Peers to elect 26. Most people will concur in the opinion expressed by the Committee that in this way 'a natural and adequate representation of the separate divisions of the kingdom would be secured, and the provisions of the Acts of Union to all intents and purposes would be observed'.

Would the cumulative vote be likely to give rise to political manipulation? This obvious criticism was anticipated by the Committee. They were, however, sufficiently optimistic to believe that 'although official lists of candidates might be supplied by party authorities, the independence of the Peers would assert itself, and secure the election of the most suitable representatives'. Outsiders may or may not share the confidence expressed by the Peers in the wisdom and integrity of their Order; but it is tolerably safe to assume that the 200 representative Lords of Parliament would include all the members of the existing Peerage who had any real title to a place in the legislature, apart from those who would obtain admission to the new House by 'qualification'.

For it must be noted that the 'Representative' Lords were to form little more than a moiety of the reconstituted Chamber. The main principle of admission was to be 'qualification'. Among the 'qualified' Lords of Parliament were all Peers who held or had held any of the follow-

ing offices: Cabinet Minister, Viceroy of India, Governor-General of Canada or Australia, High Commissioner of South Africa, Lord-Lieutenant of Ireland; or who had been Speaker of the House of Commons; or who had attained to the highest offices in the public service, as soldiers, sailors, administrators, or diplomatists; or had held 'high judicial office', or the office of Attorney- or Solicitor-General for England, Lord Advocate for Scotland, or Attorney-General for Ireland. Peers holding certain specified political or Court offices were to be entitled to a writ of summons for the duration of the Parliament. Any Peer, by hereditary succession, who had served for ten years in the House of Commons, and any created hereditary or life Peer who had served for twenty years, was to be entitled to sit for life in the House of Lords. It was calculated that about 130 of the existing hereditary Peers would find in one or other of the above qualifications an avenue to the new House.

There remained two other elements: life Peers and Bishops. In regard to the latter, the Committee were at pains to make it clear that 'they had not overlooked the fact that a large section of the community would be glad to relieve the Bishops of their legislative duties and give them the opportunity of devoting themselves exclusively to the charge of their dioceses'. The point is delicately put. Eventually it would seem that antiquarian considerations were for once allowed equal weight with those of a purely utilitarian character. The Committee, 'having in mind the immemorial position of the Bishops in the House of Lords, and the special authority with which they are able to speak on many subjects,' decided to apply the same principle to the spiritual as to the lay Peerage. The two Archbishops were to sit 'by right during the tenure of their Sees'; the rest of the Bishops were to elect eight of their number to represent them for the duration of each Parliament.

As to life Peerages, the Committee pertinently pointed out that the whole aspect of this much-disputed question is changed by the proposals already made for modifying,

and indeed abolishing, the hereditary constitution of the House. They recommended, however, that the Crown should be empowered to summon annually four Peers for life, as Lords of Parliament. Of the four, three must possess one of the 'qualifications' enumerated above, and the total number existing at any one time must not, exclusive of the Lords of Appeal in Ordinary, exceed forty. The position of the latter, as already pointed out, was not to be in any way affected.

The new House would, under the arrangements suggested, consist in all of something less than 400 members. Of these, 200 were to be representative hereditary Peers, elected by their fellows; 130 qualified hereditary Peers; 10 Spiritual Lords of Parliament; and the total was to be made up by 5 Lords of Appeal in Ordinary, 3 Peers of the Blood Royal, with a possible maximum of 40 life Peers.

Many difficult questions remained unsolved by this Report, though the 'draft' Report made it clear that they were considered. The sands, however, were running out, if indeed the time for 'reform from within' had not already gone by. Yet Lord Rosebery persisted in his efforts. In the autumn of 1910 he induced the Peers to affirm two most important propositions: firstly, that henceforward no Lord of Parliament should be allowed to sit and vote in the House of Lords merely by virtue of hereditary right; and, secondly, that it was desirable that the House should be strengthened and reinforced by the addition of new elements from the outside.

In 1911 Lord Lansdowne made the heroic effort to which reference has already been made. He introduced a Bill framed in the spirit of the Rosebery resolutions. The new Second Chamber was to be only about half as large as the existing House of Lords, and was to consist of 320 to 350 members. Apart from Peers of the Royal Blood, the Law Lords, the Archbishops of Canterbury and York, and five Bishops elected by the whole Episcopate, the new House was to contain three main elements: (i) 100 hereditary Peers, elected by their Order from among Peers qualified

by public service, ministerial, parliamentary, Colonial, military, naval, or in local government; (ii) 120 persons, elected on the principle of proportional representation by members of the House of Commons grouped in electoral areas, each area to be arranged with consideration for existing constituencies, community of interests, and population, and to return not less than three and not more than twelve Lords of Parliament; (iii) 100 persons nominated by the Crown in proportion to the strength of parties in the House of Commons. The term of office for all three categories was to be twelve years, but one-fourth in each class were to retire every three years. Peers not elected to the Upper House were to be eligible for election to the Lower, but the Crown was to be restricted in the creation of new Peers to five a year, in addition to Cabinet or ex-Cabinet Ministers. Such was the admirable scheme intended to mollify the opponents of the hereditary Chamber; the Bill was read a second time on May 22, but, amid the excitement engendered by the Parliament Bill, made no further progress.

The Bill, it will be observed, dealt not with powers, only with Constitution, nor was it proposed that the House, thus reconstituted, should possess powers co-ordinate with those of the House of Commons. But Lord Lansdowne's views on this matter may be best stated in his own words:

'We desire to have a Second Chamber so composed that it will command the confidence of the country by its ability, its experience, its authority, and above all by its independence. We desire that it should be in close touch with public opinion, but not that it should be at the mercy of popular caprice. We desire that it should not be strong enough to resist the House of Commons when the House of Commons represents the deliberate judgement of the country, but that it should be strong enough to make a stand where there is reason to believe that the country has not had an opportunity of expressing its will clearly and deliberately; such a house we have endeavoured to construct,—not upon a site from which every shred and vestige of the old structure has been removed, but preserving

the soundest materials which we can find on that site, strengthened and rearranged so that the new chamber, while faithfully serving the democracy, will be strong enough to resist the gusts of passion and prejudice with which all democracies are necessarily familiar.'

Lord Lansdowne's proposals, admirable as far as they went, were allowed to lapse, and the Parliament Bill, confined, save for its Preamble, to the problem of powers, became law.

From the first, however, the Parliament Act was regarded only as an instalment of reform. Speaking on 20 March 1910 Mr. Asquith had himself said: 'I do not put forward the Resolution[1] which we shall submit to the House as a final or as an adequate solution of the problem. . . . The problem, therefore, will still remain a problem calling for a complete settlement, and in our opinion that problem does not brook delay.'[2] And again, on 3 April 1911, he said: 'The Government regard themselves as bound not only in honour but by the strict letter of their pledges and by the actual terms of the Bill itself to give effect to the preamble as and when the proper time arrives.'[3]

The War intervened; the strife of domestic faction was hushed; a Conference, presided over by Mr. Speaker Lowther, had produced in 1917 an agreed scheme for a wide extension of the suffrage, and in the same year Mr. Lloyd George, as head of a Coalition Government, appointed a strong Committee, drawn from both Houses and all parties, to inquire and report: (i) as to the nature and limitations of the legislative powers to be exercised by a reformed Second Chamber; (ii) as to the best mode of adjusting differences between the two Houses of Parliament; and (iii) as to the changes which are desirable in order that the Second Chamber may in future be so constituted as to exercise fairly the functions appropriate to a Second Chamber.

The Committee sat, under the chairmanship of the

[1] *Supra*, p. 180. [2] *Parliamentary Debates*, 29 March 1910, col. 1168.
[3] *Parliamentary Debates*, 3 April 1911, col. 1931.

veteran jurist Lord Bryce, for more than six months, and held nearly fifty prolonged sittings. It included, apart from Lord Bryce and the Archbishop of Canterbury (Dr. Davidson), men of such weight in their respective parties as Lord Lansdowne, Lord Selborne, Lord Stuart of Wortley, and Mr. (now Sir) Austen Chamberlain, on the one side, and Lord Crewe and Lord Loreburn on the other, while Lord Balfour of Burleigh, Lord Dunraven, and Lord Hugh Cecil represented a more detached standpoint. Never before has the whole subject been so exhaustively explored by a Committee so strong in personnel and so representative of different standpoints. If their Report should seem to be hardly commensurate with the labour and learning expended upon it; if the scheme recommended therein should seem to lack either the symmetry of the French Senate or the boldness of conception which characterized the work of Alexander Hamilton and his colleagues in America, we perhaps attribute it to a desire to secure a virtually unanimous Report.

The Report began by enumerating the functions appropriate to a Second Chamber. These are stated so succinctly as to permit and justify quotation in full:

6.—(1) The examination and revision of Bills brought from the House of Commons, a function which has become more needed since, on many occasions, during the last thirty years, the House of Commons has been obliged to act under special rules limiting debate.

(2) The initiation of Bills dealing with subjects of a comparatively non-controversial character which may have an easier passage through the House of Commons if they have been fully discussed and put into a well-considered shape before being submitted to it.

(3) The interposition of so much delay (and no more) in the passing of a Bill into law as may be needed to enable the opinion of the nation to be adequately expressed upon it. This would be specially needed as regards Bills which affect the fundamentals of the Constitution or introduce new principles of legislation, or which raise issues whereon the opinion of the country may appear to be almost equally divided.

(4) Full and free discussion of large and important questions, such as those of foreign policy, at moments when the House of Commons may happen to be so much occupied that it cannot find sufficient time for them. Such discussions may often be all the more useful if conducted in an Assembly whose debates and divisions do not involve the fate of the Executive Government.

The Committee was of opinion that in a well-constituted Second Chamber the following elements ought to find a place:

(1) Persons of experience in various forms of public work, such as judicial work, Local Government work, Civil Service work, Parliamentary work; persons possessing special knowledge of important departments of the national life, such as Agriculture, Commerce, Industry, Finance, Education, Naval and Military Affairs; and persons who possess a like special knowledge of what are called Imperial Questions such as foreign affairs and matters affecting the Overseas Dominions. (2) Persons who, while likely to serve efficiently in a Second Chamber, may not have the physical vigour needed to bear the increasing strain which candidacy for a seat in the House of Commons and service in it involve. (3) A certain proportion of persons who are not extreme partisans, but of a cast of mind which enables them to judge political questions with calmness and comparative freedom from prejudice or bias. No Assembly can be expected to escape party spirit, but the excesses of that spirit usually can be moderated by the presence of a good many who do not yield to it.

The next point for consideration was as to the position which a Second Chamber ought to occupy in our own Constitutional system. It was generally agreed that

'a Second Chamber ought not to have equal powers with the House of Commons, nor aim at becoming a rival of that assembly. In particular, it should not have the power of making or unmaking Ministeries, or enjoy equal rights in dealing with finance. This was prescribed not only by long-established custom and tradition, but also by the form of our Constitution, which makes the Executive depend upon the support of the House of Commons, and would be seriously affected in

its working by extending to a Second Chamber the power of dismissing a Government. All precautions that could be taken ought to be taken to secure that in a Reformed Second Chamber no one set of political opinions should be likely to have a marked and permanent predominance, and that the Chamber should be so composed as not to incur the charge of habitually acting under the influence of party motives. The Second Chamber should aim at ascertaining the mind and views of the nation as a whole, and should recognize its full responsibility to the people, not setting itself to oppose the people's will, but only to comprehend and give effect to that will when adequately expressed. It should possess that moral authority which an assembly derives not only from the fact that its members have been specially chosen to discharge important public duties but also from their personal eminence, from their acknowledged capacity to serve the nation, and from the confidence which their characters and careers are fitted to inspire.

It should, by the exercise of this authority, and especially by evincing a superiority to factious motives, endeavour to enlighten and influence the people through its debates, and be recognized by the people as qualified, when a proper occasion arose, to require the reconsideration of important measures on which their opinion had not been fully ascertained. Lastly, the Conference was also of opinion that it would enhance the authority of the Second Chamber, and would be in line with the whole constitutional history of this country, which has been marked by a steady and gradual development, broken by no sudden and violent change, that so far as is possible a continuity should be preserved between the ancient House of Lords and the new Second Chamber, the best traditions of the former being handed on to the new body, so as to enhance its dignity, and make a seat in it an object of legitimate ambition. The Great Council of the Nation from which the House of Lords directly descends, the House of Commons having been added to it in the thirteenth century, is the oldest and most venerable of all British institutions, reaching back beyond the Norman Conquest, and beyond King Alfred, into the shadowy regions of Teutonic antiquity.'

Having thus cleared the ground by a discussion of general principles the Report came to closer grips with the three topics specifically referred to the Conference: the

questions of Composition; of Powers; and of the best mode of adjusting differences between the two Houses.

By a process of elimination the Conference ruled out a Chamber based solely upon the principle of hereditary descent, or on that of nomination, or on that of election, either direct or indirect by local authorities, and was thus driven to the alternative of combining two methods: (i) election by members of the House of Commons grouped in territorial areas; and (ii) election by a Joint Standing Committee of five members of each House appointed for each Parliament. The great majority of the new Chamber, 246 members, was to be elected by the former method; the members of the House of Commons being grouped for this purpose in thirteen natural geographical areas. Of these London was to form one, Lancashire a second, Yorkshire a third, Wales and Monmouth a fourth, Scotland a fifth, East Anglia, &c. 2,500,000 was taken as a rough unit of population, and 15 as a minimum number of members. Thus, Wales and Monmouth, with 2,520,000 people and 35 members of Parliament was to have 15 Lords of Parliament elected in this fashion, Yorkshire 24, London and Lancashire 27, and Scotland 30.[1]

The Second Section of the new Chamber was to consist of eighty-one members elected by a Joint Standing Committee of both Houses. This latter section was in the first instance to be selected from among the Peers, Temporal and Spiritual. Ultimately the choice was to be unrestricted, provided that the number of Peers (including Diocesan Bishops) never fell below thirty. Voting was to be by the method of proportional representation, and members elected in either category were to hold office for twelve years, one-third to retire every fourth year.

As to Powers, the Second Chamber was to have no right to initiate, annul, or reject a Financial Bill, and, subject to certain definitions, the question of what was or was not

[1] The figures of population were of 1914 (estimated), and of M.P.'s from the Schedule of the Representation of the People Act 1918. Ireland was excluded.

a Financial Bill was to be decided by a Financial Joint Committee of seven members of each House, with a Chairman elected by the Committee either from its own members or from outside; the Committee to be re-elected for each Parliament. This Financial Joint Committee was to decide whether a Bill, or parts of a Bill, referred to them by either House was financial. If parts only of the Bill were financial, it could order the Bill to be divided; or, if the non-financial provisions of the Bill were more important than the financial, it could send the Bill up to the Second Chamber as a non-financial Bill. These somewhat elaborate precautions were adopted with a view to prevent 'tacking', and to discourage any attempts to override the concurrent legislative rights of the Second Chamber by including proposals of a general character in a Financial Bill.

Over Bills other than financial Bills the Second Chamber was to have concurrent rights with the House of Commons, but elaborate provision was made for the adjustment of differences between the two Chambers. A Bill rejected by one House or passed with amendments to which the other House would not agree was, on demand, to be referred to a *Free Conference*. The Conference was to consist of (i) twenty members from each House, appointed by the Committee of Selection in each House for the duration of each Parliament, and in such a manner as to enable expression to be given to the various sections of opinion in the House; and (ii) ten members of each House, appointed in the same manner *ad hoc*, in respect of every Bill referred to the Conference.

The Free Conference was to have large powers. It could redraft a Bill, and the Bill was to be accepted or rejected in the form decided by the Conference. If rejected in either House the Bill was to lapse for the session, but to be reconsidered by the Conference in the ensuing session. If then accepted, in the same form, by the Conference by a majority of not less than three, and if approved by both Houses or by the House of Commons alone, the Bill was to become law; if rejected, it was to lapse.

Such in brief outline was the Report of the Bryce Committee, and it remains as much the most elaborate and detailed of the many attempts which have been made to adapt an historic institution to the conditions and requirements of a democratic age. It is unlikely that the scheme outlined above will ever be accepted in its entirety, but the scheme covers the ground of Second Chamber reform very thoroughly; it deals comprehensively with the problem of composition; it carefully defines powers; and it suggests a method of adjusting differences between the two Houses. From the Report of the Bryce Committee any reconsideration of the problem must take its start.

Since the conclusion of the War the House of Lords has manifested great solicitude in regard to its own future. In the Session of 1921 the Lords debated it; in 1922 they devoted no fewer than six days to the subject; they returned to it in 1923; again in 1925, and in 1927 the matter was exhaustively debated during three days, at the close of which the Lords resolved, by 212 votes to 54:

'That in view of the long-standing declarations of Ministers that reform of the Second Chamber of the Legislature is of urgent importance to the public service, this House would welcome a reasonable measure limiting and defining membership of the House and dealing with the defects which are inherent in certain of the provisions of the Parliament Act.'

The acceptance of this Resolution involved an act of abnegation on the part of the Peers, since it followed an announcement on the part of the Government that the new Second Chamber would in any event contain not more than half the existing hereditary Peerage. The Lords have, however, more than once manifested their readiness to make a sacrifice of personal privileges in order to secure a more effective Second Chamber.

All the debates mentioned above will repay perusal:[1] particular attention should, however, be paid to two con-

[1] *Parliamentary Debates* (Lords), vol. xliv (21 March 1921), vols. l, li, lii (20, 29 June, 18, 20, 31 July 1922), vol. liii (5 December 1922), vol. lx (25 March, 2 April 1925), vol. lxvii (20, 22, 23 June 1927).

crete proposals made on the responsibility of the Government of the day, and of a third made, on his own responsibility, by a prominent Minister—the Earl of Birkenhead.

On 18 July 1922 the Coalition Government, of which Mr. Lloyd George was the head, submitted to the House of Lords the following Resolutions:

'I. That this House shall be composed, in addition to Peers of the Blood Royal, Lords Spiritual, and Law Lords, of—

(*a*) Members elected, either directly or indirectly, from the outside;

(*b*) Hereditary Peers elected by their order;

(*c*) Members nominated by the Crown, the numbers in each case to be determined by Statute.

II. That, with the exception of Peers of the Blood Royal and the Law Lords, every other member of the reconstituted and reduced House of Lords shall hold his seat for a term of years to be fixed by Statute, but shall be eligible for re-election.

III. That the reconstituted House of Lords shall consist approximately of 350 members.

IV. That while the House of Lords shall not amend or reject Money Bills, the decision as to whether a Bill is or is not a Money Bill, or is partly a Money Bill and partly not a Money Bill, shall be referred to a Joint Standing Committee of the two Houses, the decision of which shall be final. That this Joint Standing Committee shall be appointed at the beginning of each new Parliament, and shall be composed of seven members of each House of Parliament, in addition to the Speaker of the House of Commons, who shall be *ex officio* Chairman of the Committee.

V. That the provisions of the Parliament Act, 1911, by which Bills can be passed into law without the consent of the House of Lords during the course of a single Parliament, shall not apply to any Bill which alters or amends the Constitution of the House of Lords as set out in these Resolutions, or which in any way changes the powers of the House of Lords as laid down in the Parliament Act and modified by these Resolutions.'

Owing to the resignation of the Coalition Government in October no more was heard of these Resolutions. That is a fact to be deplored, since they offered an admirable

basis for discussion. They differed, indeed, very little from the proposals made by Lord Lansdowne in 1911, to which reference has already been made.

In 1925 Lord Birkenhead, who as Lord Chancellor must, of course, have assumed a Cabinet responsibility for the Resolution of 1922, adumbrated a scheme of his own. Premising, as every thoughtful reformer must, a reduction of numbers by at least one-half, he dismissed the idea of election, either direct or indirect. His new Chamber, of about 300 persons, he would have composed of about 120 Peers who had occupied high political, administrative, naval, or military situations in the service of the State. To these he would have added 150 Peers co-opted by the Peers, and a nominated element, to be nominated by the Prime Minister of the day. As regards composition Lord Birkenhead's scheme closely resembled that disclosed to the House of Lords by Lord Cave on 20 June 1927.

As regards Powers Lord Birkenhead would have adopted the fourth Resolution of 1922, leaving the decision as to Money Bills in the hands of a Joint Standing Committee of six members from each House, with the Speaker as *ex officio* Chairman. Lord Cave's proposal differed from this only in leaving the choice of Chairman to the Committee itself. Similarly, all three proposals—those of 1922, 1925, and 1927—would have exempted from the operation of the Parliament Act any Bill designed to alter the relations between the two Houses. In addition, Lord Birkenhead proposed to allow Ministers to speak in both Houses, and to provide, in some such manner as was suggested by the Bryce Committee, for the adjustment of differences by a Joint Session.

Lord Birkenhead was careful to say that he spoke only for himself, but, as already indicated, there is a close resemblance between his scheme and that which was unfolded, as the considered plan of Mr. Baldwin's Cabinet, by the Lord Chancellor in June 1927. So close, indeed, is the resemblance that it is unnecessary to describe the latter in further detail.

It may, however, be desirable to add that the disclosure of the latest plan was followed by a demonstration of extreme disfavour on the part of a considerable section of the younger Conservatives in the House of Commons, and by a vote of censure moved by the leader of the official Opposition, and supported by voice and vote by Mr. Lloyd George. The Opposition, or Oppositions, saw in the Cabinet scheme the opportunity for an attack upon the Government which, under the conditions of parliamentary warfare, they could not have been expected to forgo. The attitude of the Conservative critics was less easily intelligible. Never since the passing of the Parliament Act has the Conservative Party neglected any appropriate opportunity of recalling the admittedly incomplete character of that Act, or of affirming the necessity for its amendment and completion by a measure for the reconstitution of the Second Chamber, for the revision of its Powers, and for the adjustment of differences between the two Houses.

The foregoing paragraphs would seem, moreover, to justify the conclusion that, at least among Conservatives who have given thought to this difficult problem, there is a substantial measure of agreement as to the direction which changes should take. The whole matter was admirably summed up by Lord Lansdowne in 1925:

'What really matters is that we should be given—(1) A Second Chamber not unwieldy in numbers, representative of moderate and well-informed opinion in the country, and free from the suspicion which attaches to a purely hereditary chamber, and (2) That this Second Chamber should have real powers of revision, and of appealing when necessary against the *caprice of the country to its sober and deliberate judgement.*'

If for the words which I have italicized we were permitted to read 'hasty and ill-considered decisions of the House of Commons to the sober and deliberate judgement of the country', the summary could hardly, within its limits, be improved.

I say 'within its limits', for all serious students of the subject have discovered that the difficulty arises only when

an attempt is made to translate a general formula into concrete proposals. Yet, unless the whole argument of this book be misleading, that attempt must be made. Abstract philosophy and almost universal experience concur in establishing the conclusion that supreme legislative power cannot safely be entrusted to a Single Chamber.

There are, indeed, those who are unwilling to confide that power even to two Chambers. They ask, and not impertinently, whether the recognition of the ultimate sovereignty of the people does not demand and even presuppose the imposition of some check upon the legal sovereignty of a Parliament, whether bicameral or unicameral?

An affirmative answer to this question would seem to be suggested by a reference to the devices which have from time to time been adopted with a view of limiting the legal competence of legislative bodies. These devices have assumed a variety of forms. Some have relied upon a written Instrument or Constitutional Code. That method was tried in England during the Cromwellian Protectorate, but the results were not encouraging. The framers of the American Constitution improved upon the example of their Puritan ancestors. They confided to the Legislature only limited powers, and they set up a tribunal to decide whether in any given cases those powers had been exceeded.

Other devices have been suggested and in some cases adopted. The publicists who were responsible for the Constitution of the Australian Commonwealth adopted, in reference to constitutional changes, the device known as the Referendum, which was first familiarized to the modern world by the practice of Switzerland.

In the Constitution of the Swiss Confederation as adopted on 29 May 1874, and revised in this particular on 5 July 1891, there are two forms of Referendum: the 'Facultative' or 'Optional'; and the 'Obligatory'. The former *may* be invoked in ordinary legislation; the latter *must* be applied in constitutional amendment. By Article

89 it is provided that: 'Federal laws, decrees, and resolutions shall be passed only by the agreement of the two Councils. Federal laws must be submitted for acceptance or rejection by the people if the demand is made by 30,000 voters, or by eight Cantons. The same principle applies to federal resolutions which have a general application, and which are not of an urgent nature.' It will be observed that in this case the application of the device is purely optional, and that the effect of it is merely to give to the people or to the Cantons a veto on laws which have already passed both Houses. This is veto in the strictest sense.

The obligatory Referendum is something entirely different, and the difference is so important that it will be well to quote *in extenso* those Articles of the Constitution which define the method of its operation.

'Article 119. Total revision shall take place in the manner provided for passing federal laws.

Article 120. When either Council of the Federal Assembly resolves in favour of a total revision of the Constitution and the other Council does not consent thereto, or when 50,000 Swiss voters demand a total revision, the question whether the Federal Constitution ought to be revised shall be in either case submitted to a vote of the Swiss people, voting yes or no.

If in either case the majority of those voting pronounce in the affirmative, there shall be a new election of both Councils for the purpose of undertaking the revision.

Article 121. Partial revision may take place either by popular initiative or in the manner provided for the passage of federal laws.

The popular initiative shall consist of a petition of 50,000 Swiss voters for the adoption of a new Article or for the abrogation or amendment of specified articles of the Constitution.

When several different subjects are proposed by popular initiative for revision or for adoption into the Federal Constitution, each of them must be demanded by a separate initiative petition. The initiative petition may be presented in general terms or as a completed proposal of amendment.

If the initiative petition is presented in general terms, and the federal legislative bodies are in agreement with it, they

shall draw up a project of partial revision in accordance with the sense of the petitioners, and shall submit it to the people and the Cantons for acceptance or rejection. If, on the contrary, the Federal Assembly is not in agreement with the petition, the question of partial revision shall be submitted to a vote of the people, and if a majority of those voting pronounce in the affirmative, the Federal Assembly shall proceed with the revision in conformity with the popular decision. If the petition is presented in the form of a completed project of amendment, and the Federal Assembly is in agreement therewith, the project shall be submitted to the people and the Cantons for acceptance or rejection. If the Federal Assembly is not in agreement with the project, it may prepare a project of its own, or recommend the rejection of the proposed amendment, and it may submit its own counter-project or its recommendation for rejection at the same time that the initiative petition is submitted to the vote of the people and Cantons.

Article 122. The details of procedure in cases of popular initiative and popular votes on amendments to the Constitution shall be determined by federal law.

Article 123. The amended Federal Constitution or the revised portion of it shall be in force when it has been adopted by a majority of Swiss citizens voting thereon, and by a majority of the Cantons. In making up the majority of Cantons the vote of a half Canton shall be counted as half a vote.

The result of the popular vote in each Canton shall be considered as the vote of the Canton.'

It will not escape attention that to the two forms of Referendum already mentioned—the 'Facultative' and 'Obligatory'—these Articles add a third, which is known as the Constitutional Initiative, and which again bifurcates into two forms. The amendment thus initiated may be in general terms, or it may be in the form of a specific and formulated amendment. The last or 'formulated initiative' is the extremest form of legislation by popular mandate; for under its operation a Bill, involving constitutional changes of the most elaborate, complicated, and fundamental character, may actually become law, without amendment, and in the teeth of the opposition of both Houses of the Legislature.

By those who advocate the introduction of the Referendum it is proposed primarily as a convenient method of adjusting differences between the two Chambers of the Legislature. The grounds on which it is advocated may be summarized as follows: (i) that it would serve to discriminate between amendments of the Constitution and ordinary legislation; (ii) that on constitutional questions it would enable a plain and simple issue to be submitted to the electorate, and would elicit a clear and straightforward answer; (iii) that it would give 'due weight to the wishes of all voters'; (iv) that it would 'place the nation above parties or factions' and would 'greatly diminish the importance of merely personal questions'; and (v) that it would permit the sense of the nation to be taken on a particular issue without involving a change of Ministry.[1] Many of these propositions are, it will be perceived, highly disputable. Budget proposals are in practice withheld from the Referendum in Switzerland under the plea of 'urgency';[2] but is it imaginable that a Ministry could, under the Cabinet system, retain office after the rejection by the people of a really important measure? Mr. Gladstone submitted with such grace as he could command to the defeat of his second Home Rule Bill at the hands of the House of Lords; could he have retained office after its rejection by the electors?

It is not, however, within the scope of this work to argue in detail the case for or against the Referendum. Those who seek an answer to the foregoing argument will find the case stated with great force by Mr. McKechnie.[3] His argument may be briefly summarized as follows: (i) that the proposal cannot be supported for Great Britain on the analogy of Switzerland, a point which will be generally admitted; (ii) that a simple 'yes' or 'no' would decide little, and that a more complicated form of reference would hopelessly confuse the illiterate voter—a result, it may be

[1] A. V. Dicey, *National Review*, No. 23, p. 67. [2] Art. 89.

[3] *The Reform of the House of Lords*, 1909, to which further reference should be made.

suggested, not entirely to be deprecated; (iii) that much would depend upon the drafting of the reference, and that it would not be easy to decide who should draft it; (iv) that the electors 'aware that some Bill was imperative' would accept a bad Bill rather than none. But how many Bills can be described as 'imperative'? Urgent Bills, might, on the Swiss analogy, be withdrawn from the referendal category, and very few Bills, not urgent, are 'imperative'; (v) that it would make the executive omnipotent; (vi) that it would paralyse the sense of responsibility under which Parliament at present does its work, and would deprive the nation of the educational discipline derived from Parliamentary debates.

The late Lord Balfour of Burleigh was, like the present Lord Selborne, an ardent advocate of the Referendum, and, in 1911, introduced a Bill in the House of Lords to 'Provide for the Taking of a Poll of the Parliamentary Electors of the United Kingdom with Respect to certain Bills in Parliament'. The Bill provided that a Poll should be taken: (*a*) on the demand of either House, in the case of any Bill passed by the Commons, but rejected or not passed by the House of Lords within forty days after it was sent up to that House; or (*b*) on the demand of not less than two hundred members of the House of Commons in the case of a Bill passed by both Houses. In either case the Bill was to be presented for the Royal Assent if the total affirmative vote exceeded the negative vote by not less than two votes per centum of the total negative vote.

This ingenious, perhaps over ingenious, proposal was primarily, though not exclusively, designed to decide disputes between the two Houses; but it also gave a power of appeal against the decision of both Houses to a substantial minority in the House of Commons. In the heated atmosphere which prevailed in 1911 Lord Balfour's Bill had little chance of a fair consideration, and, though powerfully supported, it did not receive a second reading.

Other devices have from time to time been suggested as a check upon the omnipotence of Parliaments, but of all

of them it may be said, as it must be said of the Referendum, that, appropriate as they may be to Federal States, to States with rigid or written Constitutions, and above all to States which are infused with the genius of Direct Democracy, they are at variance with the principle of Parliamentary or Representative Democracy and are alien to a Constitution which is both largely unwritten and exceptionally flexible. But this word must be added. The Parliament Act itself is an infringement of the unwritten Conventions of this flexible Constitution. Should the Parliament Act remain unamended and the Second Chamber unreformed, we may be, however unwillingly, driven to the adoption of some other device for curbing the omnipotence of a Single Chamber, and for securing to the electorate the last word on the legislative projects of its representatives.

XIV. CONCLUSION

'If a Senate be intended as a check on kings or on multitudes, it follows that to have all its members appointed either by the prerogative of the King or by the election of the multitude is to recur to that very power which it was wished to control.'—LORD STANHOPE.

'The main end for which a Senate is constructed [is] that all legislative measures may receive a second consideration by a body different in character from the primary representative assembly, and if possible superior or supplementary in intellectual qualifications.'—HENRY SIDGWICK.

IT remains to gather up the conclusions towards which the preceding investigation may seem to point.

One conclusion emerges, on the threshold, irresistibly: that no important State, whatever be its form and government, whether federal or unitary, monarchical or republican, presidential or parliamentary, constitutionally flexible or constitutionally rigid, is willing to dispense with a Second Chamber. Of Sovereign States only Turkey, Jugo-Slavia, Esthonia, Latvia. Lithuania, and Bulgaria adhere to the unicameral system. 'States' which are component parts of a Federal State are, on the contrary, frequently unicameral. Some of the Canadian provinces are in this category, but they are not 'States', and, though extensive in area, contain as yet small populations. The Constitution of Norway is ambiguous.

There is another point which it may be well at this stage to emphasize. The preceding pages disclose the fact that, of the great States of the modern world, three of the greatest have actually tried and abandoned the experiment of a single legislative Chamber. It must be admitted that in no one of the three cases were the circumstances normal. In England and France the system was tried in a time of constitutional dislocation and social disorder. In the United States the times were eminently transitional. Too much importance must not, therefore, be attached to these cases; but it is not impertinent to note that they all ended in the same way; that while the settled order, on its

restoration, accepted much from the revolutionary period, it rejected this device, and that never was there the slightest disposition to renew the experiment when the political temperature returned to the normal.

A third conclusion which can hardly be resisted by any one who is at the trouble to master the facts presents itself: that whatever be the case with unitary States the bicameral system is essential to the successful working of a genuinely federal system. Of that system the American Republic, the German Reich, and the Australian Commonwealth[1] are the most conspicuous examples in the modern world. In each case, as we have seen, the Second Chamber embodies and enshrines the federal principle of the Constitution; the same observation holds good of Canada and Switzerland; and had the scope of this treatise permitted a further excursion, the argument would have been strengthened. In Argentina, for example, the Second Chamber is known in contradistinction to the House of Deputies *of the Nation*, as the House of Senators *of the Provinces and of the Capital*. The United States of Brazil also possesses a Senate of a federal character, though not in this respect so sharply differentiated from the other House as is the case in Argentina or the United States of America.

The prevalence of bicameralism in federal Constitutions suggests a further conclusion of considerable significance. The suggestion is not infrequently made that the framers of modern Constitutions, confronted with the difficulty of devising a Second Chamber based upon a differentiated principle, but lacking courage for the frank adoption of the unicameral system, have eagerly seized upon the federal idea as affording an escape from the dilemma. But the suggestion, though ingenious, inverts the actual historical order. The American Senate, as I have attempted to show, owes its existence not to the anxiety of the Convention to adopt bicameralism, but to its anxiety to avert disrup-

[1] As an example of *pure Federalism* I have preferred Australia to Canada, for reasons which I hope are made clear in chapters vii and viii.

tion. A Second Chamber, based not upon the principle of population but upon that of equality of representation for States of very unequal size and importance, was the condition precedent to the formation of a union. The Senate, therefore, in the United States, is not merely an intelligible makeshift, nor does it represent merely the ingenious effort of bicameral enthusiasts: it is based upon an impregnable historical fact—the fact that, but for the provision of such a guarantee for the rights of the smaller States the original English Colonies in North America would, on the consummation of the great schism, have formed a congeries of independent and possibly antagonistic republics, united only in opposition to the common mother. In brief, the great American nation was cradled in institutions which, by the ingenious adaptation of existing models, satisfied the centrifugal not less than the centripetal tendencies which manifested themselves so strongly at its birth.

What is true of the United States is not less true of Germany and of the Australian Commonwealth. The German Reichsrat and the Australian Senate do not owe their existence to an *a priori* preference for the bicameral form of legislature. A federal Second Chamber, if not indeed the only, was certainly the readiest and most convenient means of satisfying the centrifugal sentiment of the Sovereign States of Germany. Prussia might have found it impossible to fulfil her 'German mission' but for the existence of the Diet of the old Empire containing a germ which it was easy to cultivate into the Bundesrat of the Empire. And similarly in the case of Australia. The Senate, with its equal state representation, was the condition precedent to federation, and is the pledge of the security of state rights.

We are, then, entitled to conclude that bicameralism is an essential attribute of federalism.

Is it equally indispensable to the unitary State? It is clear that so far as the foregoing argument holds good its utility must be demonstrated by a different method, and based upon a different plea.

For hesitation to accept the unicameral principle in our own unitarian Constitution there would seem to be two outstanding reasons. The constitutions analysed in the present work are almost without exception written; most of them are rigid. The British Constitution is, as a whole, unwritten, and it is extraordinarily flexible. But if constitutions which are written and rigid require the safeguard of a Second Chamber, how much more does a constitution which rests largely upon conventions and can be fundamentally altered by the use of the same machinery as is habitually employed for the least important legislation? In the United States not only is Congress incompetent to alter the Constitution, but even in its ordinary legislation works with the fear of the Supreme Court for ever before its eyes. For the Court is not only, like our English Courts, the interpreter of the law, but also the interpreter of the Constitution. It has to decide not merely whether a given law is or is not applicable to a given case, but whether the law itself is legal; whether, in fact, it was within the constitutional power of the Legislature to enact it. Apart from the Supreme Court, the most elaborate precautions have been devised against hasty or ill-considered amendment of the Constitution. No such amendment can even be proposed without the assent of a two-thirds majority in both Houses of Congress, or, alternatively, of two-thirds of the State Legislatures; and before such amendment in its approved form can become part of the constitutional law of the United States it must be ratified by the Legislatures in three-fourths of the States, or by an equal number of State Conventions summoned for this specific purpose. It is not, under the circumstances, remarkable that for sixty years (1804–64) there was no amendment at all of the Federal Constitution, and that during the first century of the existence of the United States only fifteen such amendments were enacted. There have been in all only twenty. In France, as we have seen, revision must be demanded by both Chambers, and the specific amendment must be approved by a National Assembly, that is, by the

two Chambers assembled in joint session. In Sweden constitutional amendments require the direct sanction of the electorate; they must be proposed in one Riksdag and then submitted to the next. This device amounts almost, though not quite, to a referendum. A similar rule obtains in Norway. In Switzerland—the classical home of the Referendum proper—no constitutional change can be effected without the directly ascertained assent of the electors. The Constitution of the Australian Commonwealth is, next to that of the United States, perhaps the most rigid in the world. To become law any proposed amendment of the Constitution must fulfil three conditions: (i) it must pass both Houses of the Federal Legislature by an absolute majority, or must pass one House twice, after a three-months interval; (ii) must obtain the assent of the people expressed by means of a Referendum in a majority of the constituent States; and (iii) must be approved by a majority of the voters actually casting their votes in the Commonwealth as a whole. Not even with these precautions can the federal representation of the several States be altered except with the assent of the States affected. The Constitutions of Italy, Spain, and United South Africa, though written, are not rigid.

The English Constitution is neither. Based upon no single Instrument, it is unwritten and also in the highest degree flexible.

If the civilized world has decided with unanimity that the safeguarding even of a Constitution technically rigid shall not be entrusted to a single Legislative Chamber, can it conceivably be the part of statesmanship to confide to a single Chamber a Constitution which is at once the most delicately equipoised and the most easily altered in the world?

Of the foregoing chapters no fewer than three have been devoted to an analysis of the Constitution and powers of Second Chambers in British dominions beyond the sea. Canada, Australia, and South Africa have, in the framing of their constitutional Instruments, not only decided in

favour of a bicameral Legislature, but have endowed the Second Chamber with large though limited powers. In the two latter cases, moreover, special provision has been made for the solution of constitutional deadlocks. To this point, already sufficiently emphasized, it is unnecessary to revert.

The foregoing argument makes no pretence to substantiate the case in favour of the English House of Lords. It suggests, certainly, considerations tending to demonstrate the utility of a Second Chamber, but none in favour of that particular form with which we in this country are familiar.

It may incidentally have suggested certain points of comparison between other Second Chambers and our own. The House of Lords is at once the largest, the most purely hereditary, and the least powerful among the Second Chambers which have passed under review. The Italian Senate contains just under 400 members; the Japanese House of Peers 399; the Spanish, about 360; the French, 314; the Swedish Upper House, 150; the American Senate, 96; the Canadian, 96; the Danish Landsting, 76; the German Reichsrat, 68; the Netherlands Upper House, about 50; the Swiss Ständerat, 44; the Australian, 36; the South African, 40. With the exception, therefore, of the Italian and the Japanese, no Second Chamber in any important State is more than half as big as the House of Lords, and the size of the Second Chamber in most States falls far short of that proportion.

The House of Lords is not only the largest Second Chamber in existence, it has also become the most exclusively hereditary in composition. But this attribute, as we have seen, is relatively modern.[1] Originally the hereditary element was subordinate to the official. Only in the last three centuries have the hereditary lay Peers come to outnumber the spiritual Peers in a proportion so overwhelming. The Second Chambers of Japan, Hungary, Italy, and Spain most nearly resemble our own; but all these contain, besides hereditary members, considerable official and nominated elements. The Second Chambers of France, the

[1] Cf. *supra* chap. ii.

United States, the Australian Commonwealth, the Swiss Republic, Denmark, the Netherlands, Sweden and Norway, not to mention the South American Republics, are composed entirely of elected representatives—that of Belgium is purely elective save for the presence of Princes of the Blood. Some Upper Houses, like those of New Zealand, South Africa, and the Irish Free State, combine the nominee and elective principles; some, like that of Spain, the hereditary, the nominee, and the elective; some, like those of Canada, Italy, New South Wales, and Newfoundland, consist entirely of nominees. Official and selected elements are not, as I have shown, entirely absent from the House of Lords, but in voting, if not in debating power, are entirely swamped by the mass of hereditary Peers.

Is it true that the House of Lords is one of the least effective Second Chambers in the world? And, if so, can the lack of effectiveness be connected either with its unwieldy bulk, or with its predominantly hereditary character? It may be doubted whether it is within the competence of any man to answer with assurance the former question. Diligent research may disclose the paper powers of written Constitutions: but even in the most elaborate and detailed of Instruments not one half is told in writing; even in the most rigid of Constitutions convention plays no unimportant part. But to estimate aright the influence of conventions; to gauge the reaction of custom upon Constitution, an intimate personal knowledge is required, which few men can pretend to possess of many countries, and no man can possess of all. But judging as best one may, from available sources of information, the conclusion would seem to be irresistible that the House of Lords is, among the Second Chambers of the greater States, at least one of the weakest.

Its judicial powers I need not discuss: they belong only in theory to the House of Lords, being, in effect, exercised by a small staff of professional judges. Besides, many Second Chambers possess similar, though none possesses identical, functions. As regards ordinary legislation it is a rule almost universal for Second Chambers to enjoy rights

concurrent with those of the First. The Upper House of the Netherlands is an exception to this rule: it can neither initiate laws nor amend the proposals sent up to it from the Lower House. Its sole function in legislation is to approve or to reject. In theory the legislative powers of the House of Lords were, until 1911, co-ordinate with those of the Commons; in practice fewer and fewer Bills originate in the Upper House, while those sent up to them from the Commons arrive at a period of the session when it is difficult to secure for them that careful and detailed scrutiny which ought to be the proper function of a revising Chamber. It is true, of course, that this result is far from being accidental; and that despite the increasing reluctance of the Commons to allow to the Lords the exercise of such rights as still remain to them, a large amount of revising and amending work is actually accomplished; but by no straining of phrase could the legislative functions of the two Houses be described, even prior to 1911, as in practice co-extensive.

As regards Finance the powers of the English Upper House are inferior to most and superior to none. In Switzerland money Bills may be introduced indifferently in either House, and, according to a high authority, the same is true of no less than twenty-one States of the American Union.[1] The Federal Senate, though it has no power of initiation, has the right not only to reject but to amend money Bills; and the right is freely exercised. In France a Bill 'concerning the opening of a Budget or the creation of a tax' must originate in the Chamber of Deputies, but the Senate has complete powers of rejection, and may even originate a 'Bill bearing on Budgetary expenditure'.[2] Most Second Chambers have the power of rejection, several have the power of amendment as well. The power of the Australian Senate is somewhat curtailed, and that of the South African still more so. But no Second Chamber can possess less authority over Finance than our own.

[1] Morizot-Thibault, *Des Droits des Chambres hautes en matière de Finances*, p. 82, quoted by Lecky. [2] Guyot, *op. cit.*

Control over the Executive is closely connected with financial authority. Lord Salisbury, as we have seen, deprecated the interference of the Lords with finance on the specific ground that they could not dislodge a Ministry. In France, owing to the power of the Senate, in conjunction with the President, to dissolve the Chamber, the Executive is, in a sense, at the mercy of the Senate. Cabinets have resigned on account of a hostile vote in the Senate, and on no fewer than five occasions in recent times has the Cabinet appealed to the Senate for a vote of Confidence. In other cases there is some ambiguity in the matter, but it may be safely said that in this respect the power of the House of Lords is not superior to that of similar institutions elsewhere. In most Continental countries ministers have the right to speak (though not to vote) in either House, an expedient which might advantageously be imitated in England.

Yet limited as are the practical activities of the House of Lords, there is notoriously in some quarters a desire still further to restrict them. The Socialist Party (like other Parties) speaks on this subject with more than one voice. According to an official manifesto of 1918

'The [Labour] Party stands . . . for complete abolition of the House of Lords and for a most strenuous opposition to any machinery for revision of legislation taking the form of a new Second Chamber, whether elected or not, having in it any element of heredity or privilege or of control of the House of Commons by any party or class.' [1]

Mr. and Mrs. Sidney Webb, in their *Constitution for the Socialist Commonwealth of Great Britain*, declare that: 'There is, of course, in the Socialist Commonwealth no place for the House of Lords' (p. 110). Mr. J. H. Thomas declared himself to be personally in favour of a Second Chamber, but 'it should be elected by the people'.[2]

'We have not specifically stated in our amendment, said the seconder of a recent Socialist amendment in the House of

[1] *Labour and the New Social Order*, p. 12.
[2] *When Labour Rules*, pp. 246–7.

Commons, "that the Labour Party stands for single-chamber government, but as a matter of fact this party is committed to the idea of single-chamber government".'[1]

Recent proposals for a reform of the House of Lords would seem, however, to have generated in the breasts of the Socialist Party if not ardent affection for the House of Lords at least an anxiety to preserve it untouched by the hand of the reformer. Such anxiety is intelligible. It would be difficult to touch the existing structure without directly or indirectly strengthening it. Socialists, therefore, are not indisposed to allow the hereditary Peers to 'play about' in the gilded Chamber, well-assured that they are powerless to interfere with the Lower House.

It might have been anticipated that this attitude would arouse suspicion in the minds of the advocates of a Second Chamber. If such a feeling does exist it would seem for the moment to be subordinated to other sentiments. Yet it can hardly be denied that there are grounds for reasonable apprehension, by no means confined to concern for the Second Chamber.

'Fundamentals' are questioned to-day as they have not been questioned for two hundred and fifty years. A frontal attack upon the Upper House delivered by the Lower, especially if it be successful, would not be likely to leave the latter where it stood. To those who have ears to hear, the warnings afforded by the history of the Puritan Revolution are full of significance. One branch of the Legislature —itself purged and emasculated by an irresistible army— was able, supported by that army, to sweep away the Monarchy and the House of Lords. But no sooner was that consummation effected than awkward questionings arose as to the source of political authority. Doctrinaire democracy found expression in *the Agreement of the People.* Questionings were hushed and dogmas swept aside by the rough common sense of Cromwell. But the authority of the Commons did not survive. That went the way of the

[1] Cf. *Parliamentary Debates* (House of Commons), vol. 202 (15 February 1927), vol. 208, No. 94.

Monarchy and the Lords. Cromwell, genuinely anxious to conceal the sword under the toga, did his best to revive parliamentary government, and even to reconstruct the bicameral system. How and why he failed I have attempted already to show.[1] I recur, for an instant, to the experience then gained in order to emphasize the extreme danger of touching with rash and inexperienced hands the fundamentals of the polity. We must look to the rock whence we are hewn. Men who will not look back to their ancestors cannot be expected to look forward to posterity. Pygmies, as Mirabeau said, can destroy; it takes giants to build.

'With the overwhelming power that is now placed in the hands of the House of Commons, with the liability of that House to great and sudden fluctuations, with the dangerous influence which, in certain conditions of politics, small groups, or side-issues, or personal dissensions or incapacities, may exercise on the course of its decisions; with the manifest decay of the moderate and moderating elements in one of the great parties of the State, and with a Constitution that provides none of the special safeguards against sudden and inconsiderate organic change that are found in America and in nearly all continental countries, the existence of a strong Upper Chamber is a matter of the first necessity. It is probable that the continuance, without a great catastrophe, of democratic government depends mainly upon the possibility of organizing such a Chamber, representing the great social and industrial interests in the country, and sufficiently powerful to avert the evils that must, sooner or later, follow from the unbridled power of a purely democratic House of Commons.' [2]

Thus did Mr. Lecky diagnose the disease of the body politic in 1895. The intervening years have not impaired the accuracy of the diagnosis, nor invalidated the efficacy of the remedy prescribed. Is the patient more likely to adopt it now than then? No student of politics—at once fair-minded and well-informed—is likely to maintain that the existing Second Chamber is either ideal in theory or effective in practice. The hereditary element is entirely

[1] Cf. c. iii.

[2] Lecky, *Democracy and Liberty*, vol. i. 363–4.

disproportionate; its numbers are excessive, and its impartiality questionable. But the obstacles in the way of revision are neither few nor insignificant. Yet who would willingly commit the destinies of the nation, still less of the Empire, to a single popularly elected Chamber, even though its decisions were made subject to the ultimate veto of a Referendum? Experience, no less than philosophy, has declared unmistakably in favour of the bicameral system.

But to devise a good Second Chamber; to discover for it a basis which shall be at once intelligible and differentiating; to give it powers of revision without powers of control; to make it amenable to permanent public sentiment and yet independent of transient public opinion; to erect a bulwark against revolution without interposing a barrier to reform—this is a task which has tried the ingenuity of constitution-makers from time immemorial. Fortune has provided this country with a Second Chamber which fulfils some but not all of the conditions enumerated above, which has many merits and some obvious defects. Putting mere party tactics on one side, is it the part of political wisdom either to endeavour to destroy, or to refuse to amend? Should this question evoke an affirmative answer, the argument of this book will have been elaborated in vain. But is it in reality possible to resist the conclusion to which that argument points? The world, by a sober and considered and practically unanimous verdict, has affirmed its belief in the necessity of a Second Chamber. Unicameral experiments have been tried and failed.

That the Second Chamber should necessarily assume the form familiar to us in this country was never affirmed by philosophy, and has long been negatived by experience But in favour of the House of Lords there is at least one solid argument which Englishmen of all peoples in the world are least likely to undervalue: it exists. More than that: its roots strike deep in historic soil: its branches are intertwined with those of the nation at large. Adopting another metaphor, we may assert that 'even in its defects

the House of Lords has, since it ceased to be a house of feudal Peers, been a not unfaithful mirror of the country—not, indeed, of all the country's fleeting moods, but of the country's matured decisions and accomplished deeds'.[1] That the time has come for drastic reform can hardly be denied; but at least let us be assured that the task is committed to those who can approach it in no iconoclastic spirit and with informed minds; who are anxious to amend, not eager to destroy; to those who conscientiously hold with Milton that

'there is no civil government that hath been known, . . . more divinely and harmoniously tuned, more equally balanced as it were by the hand and scale of justice, than is the Commonwealth of England, where, under a free and untutored monarch, the noblest, worthiest, and most prudent men, with full approbation and suffrage of the people, have in their power the supreme and final determination of highest affairs'.[2]

[1] Pike, *Constitutional History of the House of Lords*, p. 391.
[2] *Of Reformation in England* (Complete Works, p. 17).

APPENDIX A

PARLIAMENT ACT, 1911

(CERTIFICATE OF MONEY BILLS.)

RETURN containing a list of the Bills which have been certified by Mr. Speaker or his predecessor as Money Bills under the Parliament Act, and a list of the Finance Bills passed by the House of Commons since the coming into operation of the Parliament Act which have not been so certified.

I.—MONEY BILLS ENDORSED UNDER THE PARLIAMENT ACT, 1911.

In addition to the Consolidated Fund and Consolidated Fund (Appropriation) Bills in each Session, the following Bills have been certified by the Speaker as Money Bills under the Parliament Act 1911.

Session.	
1911 ..	Telephone Transfer Amendment.
1912 ..	Isle of Man Customs. Finance.
1913 ..	Provisional Collection of Taxes. Government of the Soudan (Loan). Public Buildings (Expenses). Isle of Man (Customs). Telegraph (Money). Finance.
1914 ..	Government of the Soudan (Loan). Finance. Anglo-Persian Oil Company (Acquisition of Capital). East African Protectorates (Loans). War Loan. Death Duties (Killed in War). Superannuation.
1914–16	Finance. (Cited as Finance Act (1914) (Session 2).) War Loan. Police Magistrates (Superannuation).

1914–16	American Loan.
	Education (Small Population Grants).
	Finance (Exchequer Bonds) (Amendment).
	Finance (New duties).
	Isle of Man (Customs).
	Elementary Education (Fee Grant).
1917 ..	Army (Annual) Act 1916 (Amendment).
	Isle of Man (Customs).
	War Loan.
1918 ..	War Loan.
	Government War Obligations.
	Isle of Man (Customs).
1919 ..	Representation of the People (Returning Officers Expenses).
	Civil Contingencies Fund.
	Disabled Men (Facilities for Employment).
	Finance.
	Retired Officers (Civil Employment).
	War Loan.
	Government of the Soudan (Loan).
	Government War Obligations.
	Superannuation (Prison Officers).
	Isle of Man (Customs).
	Anglo-Persian Oil Company (Acquisition of Capital) (Amendment).
1920 ..	Finance.
	Resident Magistrates (Ireland).
	Telegraph (Money).
	Isle of Man (Customs).
	British Empire Exhibition (Guarantee).
1921 ..	Admiralty Pensions.
	Mr. Speaker's Retirement.
	Housing (Scotland) (No. 2).
	Overseas Trade (Credits and Insurance) Amendment.
	Land Settlement (Amendment).
	Isle of Man (Customs).
	Safeguarding of Industries.
	Telegraph (Money).
	Irish Railways (Settlement of Claims).

1922	..	Diseases of Animals.
		Government of the Soudan (Loan) (Amendment).
		Anglo-Persian Oil Company (Payment of Calls).
		Finance.
		Government of Northern Ireland (Loan Guarantee).
		Isle of Man (Customs).
		Telegraph (Money).
1923	..	Isle of Man (Customs).
1924	..	Diseases of Animals.
		Isle of Man (Customs).
		Old Age Pensions.
		Telegraph (Money).
		West Indian Islands (Telegraph).
		Irish Free State Land Purchase (Loan Guarantee).
1925	..	War Charges (Validity).
		China Indemnity (Application).
		Finance.
		Isle of Man (Customs).
		Diseases of Animals.
		Telegraph (Money).
		Safeguarding of Industries (Customs Duties).
1926	..	Finance.
		Isle of Man (Customs).
		Palestine and East African Loans (Guarantee).

II.—FINANCE BILLS WHICH WERE NOT CERTIFIED BY THE SPEAKER AS MONEY BILLS UNDER THE PARLIAMENT ACT 1911.

Session.	
1914-16	Finance (No. 2) Bill (cited as Finance Act 1915).
,, ,,	Finance (No. 3) Bill (cited as Finance No. 2) Act 1915).
1916	Finance Bill.
1917	,,
1918	,,
1921	,,
1923	,,
1924	,,

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APPENDIX B

SHORT LIST OF AUTHORITIES

A. TEXTS.

Dareste, F. R. : *Les Constitutions modernes* (n.e.). 1910.

Egerton, H. E.: *Federations and Unions in the British Empire*, 1911.

Eybers, G. W.: *Select Constitutional Documents illustrating South African History* (1795–1910). 1919.

Kennedy, W. P. M.: *Documents of the Canadian Constitution.* 1918.

Newton, A. P.: *Federal and Unitary Constitutions.* 1923.

Ogg, F. A.: *Governments of Europe* (n.e.). 1920.

Select Constitutions of the World (for Post-war States). (Dublin, 1922.)

Quick, Sir J., and Garran, R. R.: *Annotated Constitution of the Australian Commonwealth.* 1901.

B. GENERAL.

Borgeau, C. *Établissement et revision des Constitutions.* 1893.

Bryce, Viscount: *Modern Democracies.* 1921.

Lecky, W. E. H.: *Democracy and Liberty.* 1896.

Lowell, A. L.: *Governments and Parties in Continental Europe*, 1896.

—— *Greater European Governments.* 1925.

Maine, Sir H. S.: *Popular Government* 1885.

Marriott, Sir J. A. R.: *Mechanism of the Modern State*, 2 vols. 1927.

—— *English Political Institutions* (n.e.). 1925.

Mill, J. S.: *Representative Government.* 1861.

Munro, W. B.: *Governments of Europe.* 1926.

Sidgwick, H.: *Elements of Politics.* 1891.

Wilson, Woodrow: *The State* (n.e.). 1919.

C. SECOND CHAMBERS, ETC., IN FOREIGN STATES AND THE DOMINIONS

Bacon, A.: *L'Influence du Fédéralisme sur l'institution des Chambres Hautes.* 1899.

Bryce, Viscount : *American Commonwealth.* 1888.

Desplaces, H.: *Sénats et Chambres Hautes.* 1893.

The Federalist, 1788.

Honey, S. R.: *The Referendum among the English.* 1912.

Jenkyns, H.: *British Rule and Jurisdiction Beyond the Seas.* 1880, 1902.

Keith, A. B.: *Responsible Government in the Dominions.* 1912.

Kimball, E.: *The National Government of the U.S.* 1920.

Lees-Smith, H. B.: *Second Chambers in Theory and Practice.* 1893.

Temperley, H.: *Senates and Upper Chambers.* 1910.

Todd, A.: *Parliamentary Government in the British Colonies.* 1880.

Wilson, Woodrow: *Congressional Government.* 1896.

Borden, Sir R. L.: *Canadian Constitutional Studies.* 1922.
Kennedy, W. P. M.: *The Constitution of Canada.* 1923.
—— *The Nature of Canadian Federalism.* 1921.
Mackay, R. A.: *The Unreformed Senate of Canada.* 1926.
Morrison, J. L.: *British Supremacy and Canadian Self-Government.* 1919.
Riddell, W. R.: *The Canadian Constitution in Form and in Fact.* 1924.
Ross, G. W.: *The Senate of Canada.* 1914.
Wrong, G. M. (and others): *The Federation of Canada,* 1867–1917. 1917.

Evatt, H. R.: *Federalism in Australia.* 1918.
Kerr, R.: *The Law of the Australian Constitution.* 1925.
Moore, W. H.: *The Constitution of the Commonwealth of Australia.* 1910.
Sweetman, E.: *Australian Constitutional Development.* 1925.
Walker, H. de R.: *Australian Democracy.* 1908.
Wise, B. R.: *Commonwealth of Australia.* 1913.
—— *The Making of the Australian Commonwealth.* 1913.

Brand, H. R.: *The Union of South Africa.* 1909.
Selborne, Earl of: *Memorandum on the Union of South Africa.* 1925.
Worsfold, W. B.: *The Union of South Africa.* 1912.

Bonjour, E.: *La Démocratie suisse.* 1919.
Curti, Th.: *Le Referendum.* 1905.
Diploiqe, S.: *The Referendum in Switzerland.* 1898.
Stoddart, T. J.: *Against the Referendum.* 1910.

Barthélemy, I.: *Le Gouvernement de France.* 1919.
Bodley, I. E. C.: *France* (n.e.). 1902.
Bourgeois, E.: *History of Modern France.* 1919.
Boutmy, E.: *Études de Droit constitutionnel.* 1885.
Brandenburg, E.: *Die Reichsgründung.* 1923.
Brunet, R.: *La Constitution allemande du 11 Août 1919.* 1922.
Gooch, G. P.: *Germany,* 1925.
Oppenheimer, H.: *The Constitution of the German Republic.* 1923.
Poincaré, R.: *How France is governed.* 1915.
Vermeil, E.: *La Constitution de Weimar.* 1923.
Young, G.: *The New Germany.* 1920.

D. THE HOUSE OF LORDS

Anson, Sir W. R.: *Law and Custom of the Constitution.* 1907–13.
Bagehot: *English Constitution* (n.e.). 1913.
Courtney, L.: *The Working Constitution of the United Kingdom.* 1901.
Dicey, A. V.: *Law of the Constitution.* 1915.
Firth, Sir C. H.: *History of the House of Lords during the Civil War.* 1910.
Hearn, W. E.: *Government of England.* 1867.
Ilbert, Sir C. P.: *Parliament.* 1911.
Low, M. A. L.: *The Government of England.* 1912.
Low, Sir Sidney: *The Governance of England.* 1914.

Lowell, A. L.: *The Government of England.* 1912.
May, Sir T. E.: *Constitutional History.* 1861.
—— *Parliamentary Procedure* (ed. Webster). 1924.
McIlwain, C. H.: *High Court of Parliament.* 1910..
McKechnie, W. S.: *The Reform of the House of Lords.* 1909.
Morgan, J. H.: *House of Lords and Constitution.* 1910.
Muir, R.: *Peers and Bureaucrats.* 1910.
Pike, L. O.: *Constitutional History of the House of Lords.* 1894.
Pollard, A. F.: *Evolution of Parliament.* 1920.
Porritt, E.: *The Unreformed House of Commons.* 1903.
(Rainbow Circle): *Second Chambers in Practice.* 1911.
Reid, A. (ed.): *The House of Lords Question.* 1898.
Todd, A.: *Parliamentary Government in England.* 1867.
Turberville, A. S.: *House of Lords in xviiith Century.* 1927.
Walpole, Sir S.: *The Electorate and the Legislature,* 1881.

E. PARLIAMENTARY PAPERS, ETC.

Lords' Report on Dignity of the Peerage, 5 vols. 1829.
Report of Rosebery Committee on House of Lords. (H.L. 214.). 1907.
Report of Second Chamber Conference. (Cd. 9038.) 1918.
Reports from His Majesty's Representatives Abroad respecting the Second Chamber in Foreign States. (Cd. 3824.) 1907.
Reports on Legislative Assemblies (Foreign and Colonial), 4 parts. 1881–3.
Second Chambers in the Self-Governing Dominions (lxvi. 81). 1910.

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